SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 549

WILLIAM D. GORDON, SECRETARY OF BANKING, ET AL., ETC., PETITIONERS,

vs.

LAURA A. WASHINGTON ET AL., ETC.

No. 550

WILLIAM D. GORDON, SECRETARY OF BANKING, ET AL., ETC., PETITIONERS,

vs.

MARY A. O'BRIEN ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC), PRINTERS, WASHINGTON, D. C., JANUARY 16, 1935.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

June Term, 1933

No. 7845

LAURA A. WASHINGTON

v.

HONORABLE WILLIAM D. GORDON, Secretary of Banking, and Robt. G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company

David Bortin, Esq., for Plaintiff;
Shippen Lewis, Esq., J. K. Willing, Esq., for Defendants;
David Bortin, Esq., for Receivers.

DOCKET ENTRIES

Aug. 25, 1933. Bill of Complaint, filed.
Aug. 25, 1933. Subpœna exit, returnable September 14, 1933.
Aug. 28, 1933. Motion for appointment of Receivers, filed.
Aug. 30, 1933. Decree appointing E. W. Wells, and Richard F. Enis Receivers of trust-fund mortgages, filed.
Aug. 31, 1933. Appearance of Shippen Lewis, Esq., for Defendants filed.
Aug. 31, 1933. Bond of Receivers, with The Ætna Casualty and Surety Company, surety, in $250,000., and Decree approving same, filed.

[fol. 2]

Sept. 1, 1933. Appearance of David Bortin, Esq., for Receivers filed.
Sept. 2, 1933. Petition for and Order of Court granting rule to show cause why certain parties should not be punished for contempt of Court, filed.
Sept. 5, 1933. Motion to dimiss Bill of Complaint, filed.

Sept. 5, 1933. Petition to vacate order appointing Receivers, filed.

Sept. 5, 1933. Supplement to petition to vacate order appointing Receivers, filed.

Sept. 5, 1933. Answer to contempt petition, filed.

Sept. 5, 1933. Subpœna returned—on August 26, served Robert G. Funkhouser, Special Deputy of Banking, etc., as to William D. Gordon, Secretary of Banking—not requested to serve, and filed.

Sept. 5, 1933. Appearance of J. K. Willing for Defendants, filed.

Sept. 5, 1933. Argued sur rule to show cause why certain parties should not be punished for contempt of Court.

Sept. 5, 1933. Testimony filed.

Sept. 22, 1933. Argued sur motion to vacate appointment of Receiver and to dismiss bill of complaint.

Sept. 22, 1933. Decree amending decree of August 30, 1933, filed.

Sept. 26, 1933. Argued sur petition to vacate appointment of Temporary Receivers.

[fol. 3]

Oct. 2, 1933. Copy of petition and rule to show cause why certain parties should not be punished for contempt of Court with return of Marshal endorsed thereon, filed.

Oct. 4, 1933. Opinion Welsh, J. denying prayer of petition to vacate appointment of Receivers, filed.

Oct. 16, 1933. Testimony filed.

Oct. 16, 1933. Petition for Appeal and Decree dismissing petition filed.

Oct. 16, 1933. Certified copy of Decree of U. S. Circuit Court of Appeals allowing appeal fixing amount of bond same to act as supersedeas filed.

Oct. 16, 1933. Præcipe for transcript of record sur appeal, filed.

Oct. 28, 1933. Decree directing that Decree dismissing petition to vacate appointment of Receiver and overruling Motion to dismiss

Bill of Complaint be entered as of October 4, 1933, filed.

Nov. 2, 1933. Stipulation as to printing record on appeal, filed.

Nov. 2. 1933. Amended præcipe for transcript of record sur appeal and acceptance of service of copy of præcipe, filed.

Nov. 27, 1933. Stipulation of counsel that all testimony shall be printed as part of record on appeal filed.

[fol. 4] In United States District Court For the Eastern District of Pennsylvania

No. 7845

[Title omitted]

Stipulation for Abbreviation of Record—Filed November 2, 1933

And now, October 31, 1933, it is stipulated by counsel for all parties that none of the record in the above case shall be printed as part of the printed record on appeal to the Circuit Court of Appeals, except the docket entries, since the record in the case of Mary A. O'Brien v. William D. Gordon, Secretary of Banking and Robert G. Funkhouser, Special Deputy as Agent, in possession of Chester County Trust Company, is to be printed in full; that the following differences between the two records in matters other than the docket entries shall be noted for the information of the Court; and that in other respects the records are, for the purposes of this appeal, to be taken as similar:

[fol. 5] 1. The plaintiff, Washington, is a citizen of Connecticut and owns a $40,000 participation certificate in a mortgage pool aggregating $2,901,236.07.

2. The receivers named in the Washington case are E. W. Wells and Richard F. Ennis.

(Sgd.) Shippen Lewis, Joseph K. Willing, Attorneys for Appellants; David Bortin, Attorney for Appellee.

[fol. 6] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM 1933

No. 7849

MARY A. O'BRIEN,

v.

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company

David Bortin, Esq., for Plaintiff;
Shippen Lewis, Esq., J. K. Willing, Esq., for Defendants;
David Bortin, Esq., for Receivers.

DOCKET ENTRIES

Aug. 28, 1933. Bill of Complaint filed.
Aug. 28, 1933. Subpœna exit—returnable September 18, 1933.
Aug. 28, 1933. Motion for appointment of Receiver filed.
Aug. 30, 1933. Decree appointing John Hemphill, Esq., and J. Louis Breitinger, Esq., Receivers of trust fund mortgages, filed.
Aug. 31, 1933. Appearance of Shippen Lewis, Esq., for defendants filed.
Aug. 31, 1933. Bond of Receivers, with the Ætna Casualty and Surety Company, surety, in $150,000., and Decree approving bond filed.

[fol. 7]

Sept. 1, 1933. Appearance of David Bortin, Esq., for Receivers, filed.
Sept. 2, 1933. Petition for and Order of Court granting rule to show cause why certain persons should not be punished for contempt of Court filed.
Sept. 5, 1933. Motion to dismiss Bill of Complaint filed.
Sept. 5, 1933. Petition to vacate order appointing Receivers filed.
Sept. 5, 1933. Supplement to petition to vacate order appointing Receivers filed.
Sept. 5, 1933. Answer to contempt petition filed.

Sept. 5, 1933. Subpœna returned: "On August 29, served R. G. Funkhouser, Special Deputy of Banking etc.; as to Wm. D. Gordon, not requested to serve" and filed.

Sept. 5, 1933. Appearance of J. K. Willing, Esq., for defendant filed.

Sept. 5, 1933. Argued sur rule to show cause why certain parties should not be punished for contempt of court.

Sept. 22, 1933. Argued sur motions to vacate appointment of Receivers and to dismiss Bill of Complaint.

Sept. 22, 1933. Decree amending Decree of August 30, 1933 filed.

Sept. 26, 1933. Argued sur petition to vacate appointment of Temporary Receivers.

Oct. 2, 1933. Copy of petition and rule to show cause why certain parties should not be punished for contempt of Court—with return of Marshal endorsed thereon, filed.

[fol. 8]

Oct. 4, 1933. Opinion, Welsh J., denying prayer of petition to vacate appointment of Receivers filed.

Oct. 16, 1933. Testimony filed.

Oct. 16, 1933. Petition for appeal and Decree dismissing appeal filed.

Oct. 16, 1933. Certified copy of Decree of U. S. Circuit Court of Appeals allowing appeal, fixing amount of bond—same to act as supersedeas, filed.

Oct. 16, 1933. Præcipe for transcript of record sur appeal filed.

Oct. 26, 1933. Decree directing that Decree dismissing petition to vacate appointment of Receiver and overruling Motion to Dismiss Bill of Complaint be entered as of October 4, 1933, filed.

Nov. 2, 1933. Amended præcipe for transcript of record sur appeal, and acceptance of service of copy of præcipe filed.

Nov. 27, 1933. Stipulation of counsel that all testimony shall be printed as part of the record on appeal filed.

[fol. 9] In United States District Court, June Term, 1933

In Equity

No. 7849

[Title omitted]

Bill of Complaint—Filed August 28, 1933

To the Honorable, the Judges of Said Court:

The complainant on behalf of herself and all others in like interest, complains and says:

1. Your orator is a citizen of the State of New Jersey.

2. That she is the holder of a first mortgage participation certificate, issued by the Chester County Trust Company, at West Chester, Pennsylvania, in the sum of $3700.

3. That said certificate is one of a series of certificates issued by the said Chester County Trust Company to various persons and represents moneys received by the said Chester County Trust Company to be held as a trust fund [fol. 10] severed and apart from the assets of the company, in trust, for the holders of said certificates, and the said Chester County Trust Company agreed to keep the same invested only in first mortgages, secured on real estate in the State of Pennsylvania.

4. That there are outstanding certificates of the character issued as aforesaid to your complainant, in the aggregate sum of one million seven hundred forty-two thousand four hundred four dollars and ninety-one cents ($1,742,404.91).

5. Your complainant is informed, advised, believes and, therefore, avers that said moneys received by the said Chester County Trust Company from complainant and others was invested in certain mortgages located in various sections of the State of Pennsylvania and forming a mortgage pool set apart from the assets of the company as the property of complainant and others holding like certificates.

6. Complainant is unable to set forth the list of the mortgages forming such mortgage pool as the same are entirely in the possession of the defendants to which com-

plainant has no access and, therefore, has no control thereof.

7. That the Chester County Trust Company was, on the fourteenth day of February, 1933, closed by direction of the Honorable William D. Gordon, Secretary of Banking of the State of Pennsylvania by reason of the insolvent and unsafe condition of said trust company and has since continued to remain closed, and the assets of said institution are in the process of liquidation.

[fol. 11] 8. That said Honorable William D. Gordon, Secretary of Banking, by Robert G. Funkhouser, deputy in charge, is in possession of said trust company and of the mortgages forming said mortgage pool.

9. That no interest or income has been received by your complainant and others holding such certificates from the time of the closing of the said institution.

10. That since possession was taken of said trust company by the Secretary of Banking of the State of Pennsylvania, no account has been filed by him as to said mortgage pool operated by the said institution.

11. That such mortgage pool consists of many undivided interests which have been created by the said Chester County Trust Company and the said Secretary of Banking of the State of Pennsylvania, by virtue of his possession of the assets of said trust company is holding said mortgages in trust for complainant and others with like interest.

12. Complainant is informed, advised, believes, and therefore avers that interest on many of the mortgages comprising said pool has not been paid by the mortgagors or received by the Secretary of Banking or his deputy in possession and that little effort is made to secure the collection of the interest thereon.

13. That many of the bonds secured by mortgages forming said pool remain unpaid and there is danger of sales by the respective authorities by reason of the non-payment of taxes on said properties and that little effort is being made to compel the payment of taxes thereon.

14. Deponent avers that unless a receiver is appointed by your Honorable Court to take possession of all the mort-

[fol. 12] gages, assets, books and records forming said mortgage pool that the interest on said mortgages will continue in default and that taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of complainant and others holding like certificates.

The complainant, therefore, avers that she is without remedy at law and, therefore, prays for equitable relief as follows:

(a) That a receiver or receivers be appointed to take charge of, conserve and administer all of the assets comprising the said mortgage pool.

(b) That the said receiver or receivers be authorized and empowered to take possession of all of the mortgages and of all assets, books and records of every nature forming part of said pool controlled by Honorable William D. Gordon, Secretary of Banking or his Deputy in charge of Chester County Trust Company, West Chester, Pennsylvania, and to hold, manage and operate said mortgage pool.

(c) That the receiver or receivers be authorized to demand, sue for, collect and receive, and take into their possession all of the interest due on the mortgages forming said mortgage pool; to demand the payment of taxes on properties secured by said mortgages and to institute and prosecute the suits at law or in equity for the recovery of any assets or principal mortgages.

(d) That William D. Gordon, Secretary of Banking or his deputy in charge, be directed to turn over to the receivers all mortgages comprising said pool together with an account showing the disposition of any interest received by him since he came into possession of said Chester County [fol. 13] Trust Company and the disposition of same as well as to account for the receipts and disbursements made and received in said mortgage pool from the time of its inception.

(e) That the said Honorable William D. Gordon, Secretary, furnish to said receiver or receivers, a list of all participants in said pool with their addresses and the dates and amounts received by them, the form of interest or other income, since they became participants.

(f) That the said Honorable William D. Gordon, Secretary, and his deputy in possession, be enjoined from selling, transferring or disposing of or in any manner interfering with the mortgages forming said mortgage pool or with interfering with the receiver or receivers in the performance of their duties.

(g) Such other and further relief as to your Honorable Court may seem proper and requisite.

And your petitioner will ever pray, etc.

(Sgd.) Mary A. O'Brien, David Bortin, Attorney for Complainant.

[fol. 14] *Duly sworn to by Mary A. O'Brien. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION FOR THE APPOINTMENT OF A RECEIVER—Filed August 26, 1933

And Now, this twenty-sixth day of August, 1933, comes the complainant above named by David Bortin, Esq., her attorney, and moves for the appointment of a receiver and the entry of a decree accordingly.

David Bortin, Attorney for Complainant.

[fol. 15] IN UNITED STATES DISTRICT COURT

June Term, 1933

No. 7849

[Title omitted]

[File endorsement omitted]

ORDER APPOINTING TEMPORARY RECEIVERS—Filed Aug. 30, 1933

And Now, to wit, this 30th day of August, A. D., 1933, upon consideration of the within Bill and after hearing

thereon, and upon motion of David Bortin, Esquire, Attorney for the Complainant, it is hereby

Ordered That John Hemphill and J. Louis Breitinger, be appointed Temporary Receivers of trust fund mortgages aggregating $1,742,404.91 against which Certificates were issued by the Chester County Trust Company, located at West Chester, Pennsylvania, and now in possession of William D. Gordon, Secretary of Banking of the State of Pennsylvania by Robert G. Funkhouser, his Special Deputy as Agent in Possession of Chester County Trust Company, to hold and preserve all the mortgages, property and assets, real, personal and mixed, of whatsoever kind and description including any cash on hand and belonging to and being a part of the said trust fund, and it is further

Ordered that the said Temporary Receivers be and are authorized wherever necessary to demand, sue for, collect or institute and prosecute any actions or suits in law or [fol. 16] equity for the recovery of any interest or principal of mortgages, or both, and, wherever necessary, to institute foreclosure proceedings upon default of any of the terms or provisions of said mortgages when, in the judgment or discretion of the said Temporary Receivers, such action is desirable and necessary, and to defend, compromise, adjust, intervene or become a party to any suits or actions in law or equity, as may be necessary in the judgment of the Temporary Receivers for the proper protection and maintenance of the assets of the said mortgaged trust fund and the carrying out of the terms of this decree, and likewise to defend, compromise, adjust or otherwise dispose of any and all suits, actions and proceedings that may now be pending and embracing any of the assets of the said trust fund mortgages and to take any other action or proceedings which in the judgment of the said Temporary Receivers may be advisable or proper for the protection of the assets of said trust fund mortgages, and the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, and the Chester County Trust Company and any of their agents, deputies or officers are forthwith bound, upon demand of the Temporary Receivers to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers repre-

senting property under their control and belonging to the said mortgaged trust fund, and it is further

Ordered and decreed that the defendants, their servants, agents and employees are hereby enjoined from taking any action which might be hostile to or interfere with the conduct or management of the said mortgaged trust fund by the Temporary Receivers with leave, however, to any party in interest to have the order herein modified, all moneys received by the said Temporary Receivers to be deposited in a designated depository, and that they advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein, and it is further

[fol. 17] Ordered that the said Temporary Receivers be, and are hereby authorized in their discretion to employ such servants, attorneys and counsel as may be in their judgment advisable or necessary in the management, conduct, control or custody of the said mortgaged trust fund, and the said Temporary Receivers be and are hereby authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets of said mortgaged trust fund, and it is further

Ordered and decreed that the Temporary Receivers may enter into such agreements, employ such agents in connection with the management, care and preservation of the said mortgaged trust fund as they may deem advisable, subject to the approval of the Court in advance, and they are authorized to incur such expenses and make such disbursements as may, in their judgment, be advisable or necessary in connection with the care, preservation and maintenance of the said mortgaged trust fund, and it is further

Ordered that the Temporary Receivers within 30 days of their appointment, file with the Court a preliminary report and inventory of the assets and condition of the said mortgaged trust fund coming into their possession as Temporary Receivers, and it is further

Ordered that the said Temporary Receivers make quarterly reports to this Court as to the condition of said mortgaged trust fund and that security to be entered by the said Temporary Receivers in the sum of $150,000.00.

It is further ordered that when the amount coming into the hands of the said Temporary Receivers shall exceed the

sum of $150,000.00, that the said Temporary Receivers shall file additional security.

By the Court:

/s/ Welsh, J.

[fols. 18 & 19] IN UNITED STATES DISTRICT COURT

PETITION AND RULE TO SHOW CAUSE WHY CERTAIN PARTIES SHOULD NOT BE PUNISHED FOR CONTEMPT OF COURT—Filed September 2, 1933.

To the Honorable, the Judges of the Said Court:

The petition of John Hemphill and J. Louis Breitinger, respectfully represents:

1. That on the thirtieth day of August, A. D. 1933, your petitioners were duly appointed receivers by your Honorable Court in the above-entitled matter, and have duly qualified by entering their bond in accordance with the decree of their appointment.

2. That your Honorable Court entered a decree, directing your petitioners to take possession of all mortgages, property and assets, real, personal and mixed, of whatsoever kind and description, including any cash on hand belonging to and being a part of a trust mortgage certificate pool invested in mortgages originally by Chester County Trust Company, as Trustee, which issued participation certificates of an undivided interest in the said trust mortgage certificate pool to various persons. That the said trust mortgage certificate pool is now in the possession of William D. Gordon, Secretary of Banking of the State of Pennsylvania by Robert C. Funkhouser, his Special Deputy as Agent, having taken possession of the Chester County Trust Company's assets, in conformity with the law.

3. That the decree signed by your Honorable Court sets forth *inter alia:*

[fol. 20] "And the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert C. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, and the Chester County Trust Company, and any of their agents, deputies or officers are

forthwith bound upon demand of the receiver to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers representing property under their control and belonging to the said mortgage trust fund."

A true and correct copy of the said decree is hereto attached, made part hereof and marked Exhibit "A."

4. That on the first day of September, A. D. 1933, at 3:30 o'clock P. M. (the regular Department of Banking hours), your petitioners, in pursuance of their duties as receivers, and by direction of the decree of your Honorable Court, personally called at the Chester County Trust Company in West Chester, Pennsylvania, in order to serve the said decree upon Robert C. Funkhouser, Special Deputy as Agent in Charge of the said Trust Company and to demand and to take possession of all of the mortgages, property and assets, real, personal and mixed, belonging to and being a part of the trust mortgage certificate pool directed by your Honorable Court to be turned over to your petitioners, in conformity with the order of your Honorable Court.

5. That your petitioners were informed by C. Archer Darlington, the agent of Robert C. Funkhouser, Special Deputy, that Robert C. Funkhouser was not in the bank building; that the said C. Archer Darlington did not know where the said Robert C. Funkhouser, Special Deputy, was to be found or located, and after serving the said order of [fol. 21] your Honorable Court, duly certified by the Clerk of the District Court of the United States for this district and showing that the said petitioners had qualified by entering their bond, were informed and advised by the said C. Archer Darlington that he would not turn over any of the said assets forming the said trust mortgage certificate pool without an order from Robert C. Funkhouser, Special Deputy.

6. That thereupon your petitioners demanded to see the Trust Officer and were directed by the said C. Archer Darlington to Elbert M. Pusey, Esq., a member of the Bar of West Chester, Pennsylvania, and who formerly occupied the position of Trust Officer of the said Chester County Trust Company, and who at the time petitioners called at the Chester County Trust Company, stated to your peti-

tioners that he was the agent in charge of the trust mortgage certificate pool directed to be turned over to your petitioners by decree of your Honorable Court, in the absence of Robert C. Funkhouser, Special Deputy.

7. That the said Elbert M. Pusey, Esq., after carefully reading the said decree, in the presence of your petitioners, called Howard F. Troutman, Esq., a member of the West Chester Bar and representing Robert C. Funkhouser, Special Deputy in Charge of the said Chester County Trust Company.

8. After reading the said decree to the said Howard F. Troutman, Esq., the said Elbert M. Pusey, Esq., informed petitioners that he was speaking to Howard F. Troutman, Esq., attorney for the Deputy in Charge, and that as a result of said conversation, he was authorized to and did accept service of the certified copy of decree of your Honorable Court, but refused, after demand by petitioners, to [fol. 22] surrender any of the assets forming the said trust mortgage certificate pool directed to be turned over to your petitioners, although they were in his possession and under his control and shown and exhibited to your petitioners.

9. Your petitioners aver that every reasonable effort was made by them to secure possession of the assets as directed by the decree of your Honorable Court, and that they are advised by their counsel that oral notice was given to counsel who appeared for the Banking Department on Thursday, August 30, 1933, that your petitioners would call on Friday at the offices of the Chester County Trust Company, upon Robert C. Funkhouser, Special Deputy or his agents for the surrender of the property directed by your Honorable Court to be turned over to your petitioners.

10. That the persons, to wit, Elbert M. Pusey, Esq., and C. Archer Darlington, who are the agents and representatives of Robert C. Funkhouser, Special Deputy in Charge of the Chester County Trust Company in the absence of Robert C. Funkhouser, were in actual charge of the property directed by your Honorable Court to be turned over and surrendered to your petitioners, but notwithstanding the fact that they had possession and control thereof, in violation of the said order and in contravention and in de-

fiance of the laws of the United States, they refused to abide by the said order and decree and still refuse to turn over any of the books, records, papers, bonds, mortgages, deeds, moneys, or other assets comprising the said trust mortgage certificate pool.

Wherefore your petitioners pray for a rule to issue against Robert C. Funkhouser and his agents, Elbert M. Pusey, Esq., and C. Archer Darlington, to show cause why [fol. 23] they and each of them should not be adjudged in contempt of the order and decree of your Honorable Court.

And your petitioners will ever pray, etc.

(Sgd.) David Borton, Solicitor for Petitioner.

Duly sworn to by J. Louis Breitinger. Jurat omitted in printing.

[fol. 24] RULE

Before Welsh, J.

And Now, to wit, this second day of September, A. D. 1933, upon consideration of the foregoing petition, and on motion of David Bortin, Esq., and Hirschwald, Goff and Rubin, Esqs., attorneys for petitioners, a rule is hereby entered on Robert C. Funkhouser, and his agents, Elbert M. Pusey, Esq., and C. Archer Darlington, to show cause why they should not be adjudged guilty of contempt of court for failure to comply with the decree of this Court.

Rule returnable the fifth day of September, A. D. 1933, at 10 o'clock A. M. in Room 310.

By the Court:

Attest: Leo A. Lilly, Deputy Clerk.

[fol. 25] EXHIBIT "A" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA—JUNE TERM, 1933

In Equity

No. 7849

MARY O'BRIEN, Complainant

vs.

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company, Defendants

Order

And now, to wit, this 30th day of August, A. D. 1933, upon consideration of the within Bill and after hearing thereon and upon motion of David Bortin, Esquire, Attorney for the Complainant, it is hereby

Ordered that John Hemphill and J. Louis Breitinger, be appointed Receivers of trust fund mortgages aggregating $1,742,404.91 against which Certificates were issued by the Chester County Trust Company, located at West Chester, Pennsylvania, and now in possession of William D. Gordon, Secretary of Banking, of the State of Pennsylvania, by Robert G. Funkhouser, his Special Deputy as Agent in Possession of Chester County Trust Company, to hold and [fol. 26] preserve all the mortgages, property and assets, real, personal and mixed, of whatsoever kind and description including any cash on hand and belonging to and being a part of the said trust fund, and it is further

Ordered that the said Receivers be and authorized wherever necessary to demand, sue for, collect or institute and prosecute any actions or suits in law or equity for the recovery of any interest or principal of mortgages, or both, and, wherever necessary, to institute foreclosure proceedings upon default of any of the terms or provisions of said mortgages when, in the judgment or discretion of the said Receivers, such action is desirable and necessary, and to defend, compromise, adjust, intervene or become a party to any suits or actions in law or equity, as may be necessary in the judgment of the Receivers for the proper pro-

tection and maintenance of the assets of the said mortgaged trust fund and the carrying out of the terms of this decree, and likewise to defend, compromise, adjust or otherwise dispose of any and all suits, actions and proceedings that may now be pending and embracing any of the assets of the said trust fund mortgages and to take any other action or proceedings which in the judgment of the said Receivers may be advisable or proper for the protection of the assets of said trust fund mortgages, and the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and the Chester County Trust Company and any of their agents, deputies or officers are forthwith bound, upon demand of the Receivers to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers representing property under their control and belonging to the said mortgaged trust fund, and it is further

[fol. 27] Ordered and Decreed that the defendants, their servants, agents and employees are hereby enjoined from taking any action which might be hostile to or interfere with the conduct or management of the said mortgaged trust fund by the Receivers with leave, however, to any party in interest to have the order herein modified, all moneys received by the said Receivers to be deposited in a designated depository, and that they advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein, and it is further

Ordered that the said Receivers be, and are hereby authorized in their discretion to employ such servants, attorneys, and counsel as may be in their judgment advisable or necessary in the management, conduct, control or custody of the said mortgaged trust fund, and the said Receivers be and are hereby authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets of said mortgaged trust fund, and it is further

Ordered and Decreed that the Receivers may enter into such agreements, employ such agents in connection with the management, care and preservation of the said mort-

gaged trust fund as they may deem advisable, subject to the approval of the Court in advance, and they are authorized to incur such expenses and make such disbursements as may, in their judgment, be advisable or necessary in connection with the care, preservation and maintenance of the said mortgaged trust fund, and it is further

Ordered that the Receivers within 30 days of their appointment, file with the Court a preliminary report and inventory of the assets and condition of the said mortgaged trust fund coming into their possession as Receivers, and it is further

[fol. 28] Ordered that the said Receivers make quarterly reports to this Court as to the condition of said mortgaged trust fund and that security to be entered by the said Receivers in the sum of $150,000.00.

It is further ordered that when the amount coming into the hands of the said Receivers shall exceed the sum of $150,000.00, that the said Receivers shall file additional security.

By the Court:

/s/ Welsh, J.

[fol. 29] IN UNITED STATES DISTRICT COURT

ANSWER TO CONTEMPT PETITION—Filed September 5, 1933

Robert G. Funkhouser, Elbert N. Pusey and C. Archer Darlington, answer as follows to the petition for a rule to show cause why they should not be adjudged in contempt:

1. The respondents deny that the petitioners were duly appointed receivers in this matter and aver, on the advice of counsel, that the order appointing them receivers is void.

2. Admitted, except that the respondents aver, on the advice of counsel, that the decree appointing receivers is void.

3. The respondents have not seen the original decree signed by the court but believe the quotation in the petition to be correct since the attorney for the petitioners so certifies.

4. Admitted.

5. Admitted.

6. Denied. Elbert N. Pusey informed the petitioners that he was not in charge of the mortgage pool, that he had nothing to do with it, and that he could deliver no assets or records without orders from his superior, Robert G. Funkhouser, who was then absent.

7. Admitted.

8. It is admitted that Elbert N. Pusey permitted the petitioners to leave with him what purported to be copies of an order of this court appointing receivers. It is also admitted that Elbert N. Pusey refused to surrender to the petitioners [fol. 30] any of the assets of the mortgage pool. It is denied that such assets were in the possession and under the control of Elbert N. Pusey.

9. It is denied that every reasonable effort was made by the petitioners to secure possession of the assets. It is denied that any notice, oral or written, was given to any of your petitioners or to counsel who appeared for the Banking Department, of an intention to make a demand on September 1, as above described. The petitioners appeared without notice, in the absence of the deputy receiver, at 3:30 P. M. on the Friday before Labor Day.

10. It is denied that Elbert N. Pusey and C. Archer Darlington were in actual charge of the assets of the mortgage pool and it is denied that they had possession and control thereof. It is admitted that they refused to turn over any of the records or assets.

For further answer the respondents say:

11. The respondent, Robert G. Funkhouser, deputy receiver, was absent from the trust company building when the petitioners arrived, accompanied by two other persons claiming to be receivers of another mortgage pool, and accompanied by counsel. The respondents, Pusey and Darlington, are subordinates of the respondent, Funkhouser, and have no authority to deliver any paper or asset to anyone without orders from Funkhouser. When Funkhouser returned to the trust company building on September 1, 1933, and found for the first time that the alleged receivers had demanded possession of the assets, the business day was nearly over. On the very next day, being Saturday before Labor Day, a Deputy United States Marshal served,

at about noon, copies of the petition to which this answer is [fol. 31] made. No notice of an intention to take this step was given to any of your petitioners or to their counsel.

12. The respondents aver, on the advice of counsel, that the order appointing receivers is void; that the assets and records of the mortgage pool are entirely safe in the possession of the Secretary of Banking and of the deputy receiver as they have been since the Chester County Trust Company closed on February 14, 1933; that there is no occasion for haste; and that they cannot turn over the said assets and records to anyone without an order from the Court of Common Pleas of Chester County, which court alone has jurisdiction with respect to this matter.

13. The respondents are advised by counsel for the Department of Banking, and therefore aver, that on September 5, 1933, the defendants in this cause will present to the Court a motion to dismiss the bill for want of equity and a petition to vacate the order appointing receivers.

14. On September 4, 1933, upon bill of complaint filed with Court of Common Pleas of Chester County by a mortgage pool certificate holder, that Court ordered an injunction to issue restraining your petitioners from delivering any assets or records of the said mortgage pool to any persons appointed receivers by the United States District Court, pending further order from the Court of Common Pleas of Chester County. This injunction was issued and service thereof has been effected. A copy of the injunction is attached hereto, marked Exhibit "A."

Robert G. Funkhouser, Elbert N. Pusey, C. Archer Darlington.

[fol. 32] EXHIBIT "A" TO ANSWER

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY

Equity No. 858

NATIONAL BANK OF CHESTER COUNTY AND TRUST COMPANY, Substituted Guardian in Place of Chester County Trust Company, Guardian of the Estate of John B. McCreery, a Minor,

v.

WILLIAM D. GORDON, Secretary of Banking, of the Commonmonwealth of Pennsylvania, Receiver of Chester County Trust Company, and ROBERT G. FUNKHOUSER, Deputy Receiver of Chester County Trust Company.

Decree

And Now, September 4, 1933, the foregoing Bill having been presented and considered, it is ordered and adjudged that a preliminary injunction shall issue enjoining and restraining William D. Gordon, Secretary of Banking of the Commonweath of Pennsylvania, Receiver of the Chester County Trust Company, Robert G. Funkhouser, Deputy Receiver of said company, and all other persons in their employ from delivering to any or all persons appointed receiver by the United States District Court of the Eastern District of Pennsylvania, all mortgages, securities, books, papers, records and all other matters pertaining to the first mortgage participation certificate pool until hearing shall be had on this bill, which is hereby set for the 8th day of September, 1933 at 9 A. M. and thereafter to abide further order by the Court.

W. Butler Windle, J.

[fol. 33] *Duly sworn to by R. G. Funkhouser. Jurat omitted in printing.*

[fol. 34] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Testimony—Hearing, September 5, 1933

Philadelphia, Pa., Tuesday, Sept. 5, 1933

Before Hon. George A. Welsh, J.

Present: David Bortin, Esq., and Hirschwald, Goff & Rubin, by David Goff, and Alexander N. Rubin, Esqs., for the complainant; William A. Schnader, Attorney General of the Commonwealth of Pennsylvania; Shippen Lewis, Esq., Special Deputy Attorney General, and Joseph K. Willing, for the Defendants.

Mr. Bortin: This is a hearing upon the petition of Edward W. Wells and Richard F. Ennis, Receivers, for a rule to issue against Robert C. Funkhouser and his agents, Albert M. Pusey, Esq., and C. Archer Darlington, to show cause why they, and each of them, should not be adjudged in contempt of the order and decree of your Honorable Court.

Evidence on Behalf of the Petitioners

JOHN HEMPHILL, having been duly sworn, was examined and testified as follows:

By Mr. Bortin:

Q. You are one of the receivers appointed by this Court in the matter of Laura A. Washington against Hon. William D. Gordon and others?

A. Yes, sir.

[fol. 35] Q. Tell the court what happened when you went with the order of the Court to the Chester County Trust Company, to serve the order of the Court, and to take possession of the assets.

A. We went last Friday, at about three o'clock in the afternoon, or a little after three. The party then consisted of yourself and Mr. Goff, attorneys, Mr. Wells, Mr. Ennis, Mr. Breitinger and myself, the four receivers.

Q. Tell the Court what took place.

A. We went into the building, and there we met, the first person who appeared was Mr. Darlington, whom I knew and spoke to, and Mr. Ennis likewise knew him, and to whom we introduced the others of the parties, and we asked him where Mr. Funkhouser was, and he said that Mr. Funkhouser was out, and he did not know just when he would return.

Q. What did you do then?

A. We then talked for a while to Mr. Darlington, and showed him the certified copy of the decree, that is, as I recall it, Mr. Bortin handed it to him. He did not know exactly what to do about it, and while the discussion was on I left with Mr. Ennis to call Mr. Troutman, attorney for the Commissioner of Banking, and when I got back with Mr. Ennis, I found the rest of the parties in the office with Mr. Pusey, of the bank——

By the Court:

Q. Who is Mr. Pusey?

A. I don't know whether Mr. Pusey was the trust officer or the assistant trust officer of the Chester County Trust Company; but he remained in the employ, and he now remains there in the employ of the Commissioner of Banking. Mr. Pusey had in his hand, and was reading at the time, the certified copy of the decree of the Court.

[fol. 36] By Mr. Bortin:

Q. That was in your presence?

A. Yes, sir, when I came in he had it in his hand and was reading it. Mr. Pusey, like Mr. Darlington, did not seem to know exactly what to do. A telephone call was made to Mr. Troutman, only one side of which I heard, and it did not seem to result in anything definite.

By the Court:

Q. Was that an incoming or an outgoing call?

A. I think Mr. Pusey put that call into Mr. Troutman. Then there was some further discussion, and there was an incoming telephone call which came in, at which time Mr. Pusey was apparently talking to a Deputy Commissioner of Banking, whose name I have forgotten, Mr. Shelmire, or something of that kind.

By Mr. Bortin:

Q. Was it Skidmore?

A. Skidmore, yes, sir; and I heard Mr. Pusey speaking over the phone, as if repeating instructions given to him from the other end, that he could accept service, but that he did not have the right to turn over anything to the receivers, pursuant to the Court's decree. That substantially closed the episode, and we left after we had examined the thing in detail, and had noted the actual existence in the safe of a great many files and folders which Mr. Pusey said contained the mortgages in question.

Cross-examination.

By Mr. Willing:

Q. Do you reside in West Chester, is that correct?

A. Yes, sir.

Q. On the day when you went out with the other gentlemen whom you have mentioned to serve this decree, had you [fol. 37] given notice to Mr. Funkhouser before you went?

A. No, Mr. Willing, I had not done so myself, and I did not know until the day before that we were going, and I was told to be at Mr. Bortin's office at two o'clock. I asked Mr. Bortin whether you, Mr. Willing, had received notice, and he said, yes.

Q. And you did not know as a matter of fact whether I had been on notice, or was not on notice?

A. I do not know, no, sir.

Q. Who is the deputy receiver of the Chester Trust Company?

A. Mr. Funkhouser is a deputy commissioner in charge, is that what you mean?

Q. The act calls him deputy receiver, and I used that terminology. Mr. Funkhouser and Mr. Pusey and Mr. Darlington were there, and Mr. Pusey and Mr. Darlington are simply employees at the bank, is that correct?

A. To the best of my knowledge.

Q. You did not see Mr. Funkhouser, did you?

A. No, I did not.

Q. And Mr. Funkhouser, as far as you know, did not know that you were coming with the Court decree, is that correct?

A. That is correct.

Re-direct examination.

By Mr. Bortin:

Q. Did Mr. Pusey say that he was in charge and had the control of all of those papers comprising this mortgage pool, and did he show you where they were located?

A. I don't recall, Mr. Bortin, that specific statement. He said that he was in control of their possession, and he took us to the safe; that was to see they were there.

[fol. 38] Q. And you saw him reading the order of the Court?

A. Yes, sir; he read it over, and in addition to that he read it over the telephone to this Deputy Commissioner of Banking. I read to him two or three paragraphs that contained the mandate of this Court to all employees of the Commissioner of Banking, to turn over these papers.

By the Court:

Q. What is the name of that Deputy Commissioner?
A. It has slipped my mind, temporarily; but I heard it a moment ago.

By Mr. Bortin:

Q. Was it Mr. Skidmore?
A. Skidmore, that was the name.

By the Court:

Q. Is he here this morning?
A. I don't know.
Q. Is Mr. Funkhouser here?
A. Yes, sir.
Q. Where is Skidmore?

Mr. Bortin: Skidmore was not in the bank at all.

By the Court:

Q. Was this over the telephone?
A. That was over the telephone to Mr. Pusey.

The Court: Will you get him here this morning?
Mr. Willing: Yes, sir.

[fol. 39] Recross-Examination.

By Mr. Willing:

Q. What time did you get there?

A. It must have been very close to 3 o'clock, perhaps a few minutes after.

Q. What time did you leave?

A. We met at Mr. Bortin's office at 2:10; I did not look at my watch; I am only just estimating the driving time, but I believe it was 3 o'clock, or it could not have been more than ten minutes after 3.

Q. What time did you leave, do you know?

A. I think we left a little after 4.

Edward W. Wells, having been duly sworn, was examined and testified as follows:

By Mr. Bortin:

Q. You are one of the receivers appointed by the United States Court in the matter of Laura A. Washington against William D. Gordon, Secretary of Banking, et al.?

A. Yes, sir.

Q. Tell the Court when you called upon those in charge of the Chester County Trust Company, to take over the assets ordered to be taken over by the Court.

A. I can add very little to what Mr. Hemphill has already testified to. We met at Mr. Bortin's office at 2 o'clock, and we left there a few minutes after 2; we proceeded to West Chester by automobile, and went to the banking institution. We walked in and there we met the man by the name, I think, of Mr. Donaldson, I am not sure of that name; it is the gentleman over there——

Q. Mr. Darlington?

[fol. 40] A. Yes, sir, Mr. Darlington. We met Mr. Darlington and asked him if Mr. Funkhouser was in. He said Mr. Funkhouser was not in. We asked him when he would be in and he said he did not know. We asked him whether he had received notice of our coming, and he said he had not received notice himself, and he did not know about the rest. We talked around with him for quite a while, and Mr. Hemphill went out, I think to see one of the counsel. While he was out we talked with Mr. Pusey and with Mr.

Darlington, and finally we asked him where the Trust Department was, and whether it was open, something to that effect, and he said it was in the rear. There were not many persons there in that part of the institution. I think there were two ladies there in the institution, it was rather empty and bare. We walked around to the Trust Department and there we found Mr. Pusey and a number of clerks and some other gentlemen in the Trust Department. We previously had read to Mr. Darlington the decree and order of the Court, and we read the special clause in the decree which applied to all employees there, as well as naming Mr. Funkhouser, and someone else. We called his attention to that fact. We told him of the order and told him that we were receivers under the mandate of the Court, and that he was responsible under that decree and mandate. He said he had no authority to do anything.

By the Court:

Q. Did he give you that as an answer?

A. Simply, I think, that he was not really the man in charge. Of course, I can understand his position. He did not think he could take any specific action in the absence of Mr. Funkhouser. We talked this over with Mr. Pusey and showed him the copy of the decree, and called his attention to the clause I have mentioned on the second page there, with regard to the duty of all employees as well as [fol. 41] of Mr. Funkhouser to comply with the mandate of the Court; and Mr. Pusey was apparently in the same position as Mr. Darlington. He asked whether he might confer with counsel, and we said of course, so he called up counsel, I believe; that is my impression, but I was not sure; I am not sure whether it was that conversation that came in over the telephone. Then he said, "I am directed not to turn the records and papers over to you."

Mr. Willing: I object to any telephone conversation here, as being hearsay testimony.

The Witness: I am not testifying except as to what Mr. Pusey told me. Mr. Pusey turned to us and said this. He said, "I am directed not to turn any of the records, etc., and the books, over to you." There was something about a question of the jurisdiction of the Court.

By the Court:

Q. He questioned the jurisdiction of the Court?

A. Yes, sir. We then asked him whether he had the mortgage papers and the other records there in the office, and he said he had. We asked him whether he would show them to us, and he took us into the vault, and we saw there the drawers and files, which he opened, and showed us a large collection of papers and he said, they are the mortgage papers, with the exception of a few scattered around. I think that was all, except that we asked him for them and he refused to give them to us.

By Mr. Bortin:

Q. You are sure that the entire decree was read to him?

A. Oh, yes; at least that is my impression, that he read the entire decree. I, myself, called his attention to that part of which I have spoken, referring to the employees.

[fol. 42] Q. You made demand for the assets comprised in that decree?

A. Absolutely.

Q. And Mr. Pusey showed you where they were located?

A. Yes, sir.

Q. And refused to turn them over?

A. Yes, sir.

Cross-examination.

By Mr. Willing:

Q. Did you give anyone notice as to the time you were going to go to the bank to take possession of the assets?

A. No, I did not.

Q. Do you of your own knowledge know whether Mr. Funkhouser knew you were coming?

A. No, I do not.

Q. What time did you arrive at the bank?

A. With all the rest of them, it was shortly after 3 o'clock. We left Mr. Bortin's office shortly after 2. I heard Mr. Hemphill say it would be about an hour's drive, approximately.

Q. How long were you at the bank?

A. I should say about an hour, probably a little longer.

Q. Then you left?
A. Yes, sir.

(Conference at side-bar, not reported.)

The Court thereupon adjourned until 10 o'clock A. M. Wednesday, September 6, 1933.

[fol. 43] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL IN EQUITY—Filed September 5, 1933

And now, September 5, 1933, come the defendants, by their solicitors, Joseph K. Willing and Shippen Lewis, and move the Court to vacate and set aside the order entered on August 30, 1933, appointing receivers, and to dismiss the bill of complaint for want of equity, for the following reasons:

1. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, is in possession of the business and property of the Chester County Trust Company by virtue of the laws of Pennsylvania and that he has, with respect to those assets, all the powers and duties of a general receiver appointed by any Court of Equity in Pennsylvania, except as such rights, powers and duties are increased or limited by the provisions of the Department of Banking Code which became effective on July 5, 1933.

2. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, as Secretary of Banking, in possession of the Chester County Trust Company, is "responsible to the Court in which the Certificate of Possession is filed and not to any other Court."

3. From the face of the bill and from the laws of Pennsylvania it appears that the Court of Common Pleas of Chester County have already assumed jurisdiction of the defendants, William D. Gordon and Robert G. Funkhouser, in their respective capacities of receiver and deputy re-
[fol. 44] ceiver of Chester County Trust Company.

4. From the face of the bill and from the laws of Pennsylvania it appears that the defendants are bound to file an account as to the said mortgage pool with the Court of Common Pleas of Chester County, and to deliver the assets of the pool only to a substituted fiduciary appointed by that Court, unless all the owners of undivided interests in the said pool agree upon the delivery of those assets to a person designated by them.

5. It does not appear in the bill that the Court of Common Pleas in Chester County or the owners of all undivided interests in the pool have authorized the defendants to deliver any assets or records of the said mortgage pool to any one.

6. From the face of the bill it does not appear that the complainant has made any effort to procure the appointment by the Court of Common Pleas of Chester County, of a substituted fiduciary of the said mortgage pool, as provided by the laws of Pennsylvania.

7. The bill does not state any facts to show that any damage has been done or will be done to any party in interest if receivers are not appointed.

8. The complainant has an adequate remedy by application to the Court of Common Pleas of Chester County for the appointment of a substituted fiduciary of the said mortgage pool.

9. The District Court of the United States has no authority to appoint, under the title of receivers, persons who are in fact intended to act as substituted fiduciaries of the said mortgage pool.

[fol. 45] 10. The United States District Court has no authority to interfere with the Commonwealth of Pennsylvania in the exercise of the Commonwealth's powers.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Solicitors for Defendants.

[fol. 46] IN UNITED STATES DISTRICT COURT

PETITION TO VACATE ORDERS APPOINTING RECEIVERS—Filed September 5, 1933

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The petition of William D. Gordon and of Robert G. Funkhouser respectfully represents:

1. Your petitioner, William D. Gordon, is, and has been since before February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania, and by virtue of the powers and duties conferred upon him by the laws of Pennsylvania took possession on February 14, 1933, of the business and property of Chester County Trust Company, a corporation having its place of business in the Borough of West Chester in Chester County, Pennsylvania.

2. Immediately upon taking possession, William D. Gordon filed a certified copy of his certificate of possession with the Prothonotary of the Court of Common Pleas of Chester County, who docketed and indexed it as of —— Term, 193-, No. —, as required by the laws of Pennsylvania.

3. The Department of Banking Code, a statute of Pennsylvania which became effective on July 3, 1933, provides in Section 701 as follows:

"Except as otherwise provided in this Act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other [fol. 47] court. His rights, powers and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers and duties are increased or limited by the provisions of this act."

4. Your petitioner, Robert G. Funkhouser, is the deputy receiver of Chester County Trust Company, duly appointed by the Secretary of Banking in accordance with the laws of Pennsylvania.

5. Chester County Trust Company operated a mortgage trust fund or mortgage pool known as the first mortgage

certificate pool against which there had been issued to various participants certificates which, at the closing of the trust company, aggregated $1,741,770 (including a small interest held by the trust company).

6. Since the closing of the trust company your petitioners have continued to operate the said mortgage pool and are ready at any time to file with the Court of Common Pleas of Chester County an account as to the assets comprising the pool and as to the management thereof, all in accordance with the requirements of the laws of Pennsylvania.

7. The Department of Banking Code of Pennsylvania further provides that after the Secretary of Banking has taken possession of an institution, the owner of any undivided interest in a mortgage pool may file, in the court in which the certificate of possession has been filed, a petition for the appointment of a substituted fiduciary for such mortgage pool. In every case in Pennsylvania in the past three years in which possession of a mortgage pool has been transferred from the Secretary of Banking, the transfer has been effected in accordance with the laws of Penn- [fol. 48] sylvania and in pursuance of the appointment of a substituted fiduciary by the appropriate court of common pleas.

8. No petition for the appointment of the substituted fiduciary of the said mortgage pool has yet been filed with the Court of Common Pleas of Chester County; but your petitioners are informed, believe and therefore aver that such a petition will shortly be filed by certain owners of undivided interests in the pool.

9. On August 28, 1933, a bill in equity against your petitioners was filed with your Honorable Court by the complainant in this case, averring that she owns an undivided interest in the said pool of $3700, or .2 per cent thereof, and that your petitioners are not conducting the said mortgage pool in the best interests of the participants, and praying for the appointment of a receiver or receivers of the said pool. The said complainant avers that she is a resident of New Jersey.

10. In pursuance of this bill in equity your Honorable Court issued a subpœna on August 28, 1933, commanding your petitioners to appear within twenty days after the

service thereof to answer the said bill. This subpœna was served on your petitioner, Robert G. Funkhouser, on August 29, 1933.

11. Your petitioners are informed, believe and therefore aver that no notice of the said bill in equity has been given to any other participant in the said mortgage pool, except as such participants have learned of the proceedings from conversation and from common report in and about West Chester.

12. On August 30, 1933, there being still nineteen days in which to appear and to answer the said bill, an unknown person, who refused to give his name, telephoned to your [fol. 49] petitioner, Robert G. Funkhouser, saying that he was speaking from the office of the clerk of your Honorable Court, that the said bill in equity had been called for a hearing that morning and that the hearing had been continued until 2 P. M. so that an attorney for the Department of Banking could appear.

This telephone message came at 12:40 P. M.

13. At the hearing at 2 P. M. your petitioners were represented by counsel for the Department of Banking, who had had no opportunity to examine the adjudicated cases or satisfactorily to prepare his case.

14. Counsel acting for the Department of Banking, asked for further time to consider the matter and for an opportunity to submit a brief. His Honor, Judge Welsh, who was sitting alone, said that a brief was unnecessary and that he would take the matter under advisement.

15. In less than an hour after the conclusion of the hearing his Honor, Judge Welsh, signed an order appointing

John Hemphill and J. Louis Breitinger,

receivers of the said mortgage pool.

16. Two days later, on September 1, 1933, without previous notice to the Department of Banking or to its counsel, the persons so named as receivers appeared in person, accompanied by their counsel, at the Chester County Trust Company, and demanded of C. Archer Darlington and of Elbert N. Pusey, subordinates of your petitioner, Robert G. Funkhouse, the deputy receiver, that they deliver to

them all the assets and records of the said mortgage pool. This, Mr. Darlington and Mr. Pusey refused to do without orders from your petitioner, Robert G. Funkhouser, who [fol. 50] was then absent. Mr. Pusey then accepted service of copies of the order naming the persons who claimed to be receivers, and these persons then left. Neither Mr. Pusey nor Mr. Darlington had authority to deliver any records or assets of the mortgage pool without orders from their superior, the deputy receiver. The demand above described was made at or about 3:30 P. M.

17. At or about noon of the next day, September 2, 1933, being the Saturday before Labor Day, a Deputy United States Marshal came to the Chester County Trust Company with copies of a rule issued that day on your petitioner, Robert G. Funkhouser, and on his assistants, C. Archer Darlington and Elbert N. Pusey, directing them to appear before your Honorable Court on September 5, 1933, at 10 A. M. to show cause why they should not be adjudged guilty of contempt of court. The Deputy Marshal being unable to serve these rules on all three of the persons named, service was accepted in their behalf by the representative of the Department of Justice assigned to Chester County Trust Company.

18. The persons named as receivers in the said decree are not persons chosen by the participants in the said mortgage pool, except the complainant in the bill of equity who has only a very small fractional interest in the said pool. All of the mortgages in the pool are on real estate in the counties of Chester, Delaware and Montgomery, so that it is peculiarly appropriate that the certificate-holders, who are principally Chester County people, should suggest to the Court of Common Pleas of Chester County in accordance with the laws of Pennsylvania a man of their own choice as substituted fiduciary.

19. Your petitioners have conducted the said mortgage pool with the utmost regard for the interests of the partici- [fol. 51] pants, since February 14, 1933, and no damage can occur to any party in interest if the further conduct of the pool proceeds in an orderly manner as provided by the laws of Pennsylvania.

Wherefore, your petitioners pray that the said order appointing receivers should be vacated and set aside.

And your petitioners further pray that this petition to vacate the order appointing receivers and the motion to dismiss the bill of complaint shall be heard by all three of the judges of your Honorable Court sitting in banc.

And your petitioners further pray that pending the determination of the said motion and of the said petition, your Honorable Court will order all proceedings, under the said order appointing receivers, to stay.

And your petitioners will ever pray, etc.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Solicitors for Petitioners.

[fol. 52] *Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO PETITION TO VACATE ORDER APPOINTING RECEIVERS—Filed September 5, 1933

To the Honorable, the Judges of the District Court of the United States, for the Eastern District of Pennsylvania:

As a supplement to their petition to vacate an order appointing receivers, William D. Gordon and Robert G. Funkhouser respectfully represent:

That on September 4, 1933, upon bill of complaint filed with the Court of Common Pleas of Chester County by a mortgage pool certificate holder, that Court ordered an injunction to issue restraining your petitioners from delivering any assets or records of the said mortgage pool to any persons appointed receivers by the United States District Court, pending further order from the Court of Common [fol. 53] Pleas of Chester County. This injunction was issued and service thereof has been effected. A copy of the injunction is attached hereto, marked Exhibit "A."

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Attorneys for Defendants.

Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.

[fol. 54] EXHIBIT "A" TO SUPPLEMENT TO PETITION TO VACATE, ETC.

[Omitted. Printed side page 32 ante.]

[fol. 55] IN UNITED STATES DISTRICT COURT

ORDER AMENDING ORDER APPOINTING RECEIVERS—Filed September 22, 1933

And now, to wit, this twenty-second day of September, A. D. 1933, it appearing to the Court that its order entered on the thirtieth day of August, A. D. 1933, in the above matter wherein John Hemphill and J. Louis Breitinger were appointed receivers, failed to set forth that the appointment of such receivers was temporary until hearing on bill and answer, although such temporary appointment was intended, it is

Ordered and decreed that the said order be and it is hereby amended so that John Hemphill and J. Louis Breitinger shall only have the rights, duties and privileges of temporary receivers in the above matter until hearing on bill and answer or other disposition of the cause, and that wherever the word receiver or receivers appear that the word "temporary" shall precede it.

By the Court:

Welsh, J.

[fol. 56] IN UNITED STATES DISTRICT COURT

ARGUMENT—Hearing September 26, 1933

Philadelphia, Pa., Tuesday, Sept. 26, 1933

Before Hon. George A. Welsh, J.

Present: David Bortin, Esq., for the complainants; William A. Schnader, Esq., Attorney General of the Commonwealth of Pennsylvania, Shippen Lewis, Esq., Special Deputy Attorney General, and Joseph K. Willing, Esq., for the defendants.

Mr. Bortin: Your Honor fixed the hearing to give any parties in and around West Chester an opportunity to come in and be heard in connection with this proceeding. I understand yesterday your Honor fixed a hearing for today, it having been fixed for yesterday. We have other members of the Bar of the West Chester court. I don't know whether any of them are here today. The matter was postponed yesterday until today. I don't know just what your Honor should do.

The Court: Is there anybody here from Chester County, or anybody representing any interests in this case that would like to be heard?

(No response.)

Mr. Willing: I might say to your Honor that Colonel Holden was here yesterday, but he left the court yesterday and he said he wouldn't enter an appearance in this procedure because he didn't think technically that would be the right thing to do, but if your Honor would have given [fol. 57] him an opportunity he would state, and he has authorized me to state that he represents very close to two million dollars worth of participating certificates in these pools, and that he was opposed to appointing receivers and taking jurisdiction away from the Secretary of Banking; that on behalf of the two million dollars worth of participating certificates he represents, he would state to the Court that he thought that the matter was being very well handled as is being done by the Secretary of Banking.

The Court: I am going to ask that that be put down on the notes of testimony, but I regret that the colonel is not here. He has not entered his appearance so that his status could be officially before me and counsel who represents the complainants would have an opportunity to find out exactly what the position of Colonel Holden might be, perhaps a little bit more in detail, but I am going to ask that that statement be put on the notes of testimony and be made a part of the record.

Mr. Bortin: May I ask Mr. Willing whether the colonel did not anticipate the filing of a petition for the appointment of a substituted fiduciary in this matter?

Mr. Willing: I am not here for cross-examination, I am making a statement to the Court that the colonel requested me to make.

Mr. Bortin: I am going to ask that such a statement be stricken from the record because it is not relevant to the subject in discussion now, because I would have liked to ask Colonel Holden a few questions myself.

The Court: So would the Court. I will not strike it from the record. I appreciate Mr. Willing's bringing it here as an officer of the court at the request of another member of [fol. 58] the Bar, and I will have it spread on the record; but I am, as I say, sorry that I could not have heard it in more detail.

Mr. Willing: He just requested me to make that statement.

The Court: There are many technicalities that I wanted to get in a little bit more detail.

Mr. Willing: I don't even request that this be put on the record. I have no objection to it being in the record, I am merely delivering a message from one member of the Bar to the Court.

The Court: I am putting it on the record to show that you discharged your duty to your friend so that the colonel can see for himself, if he wishes.

I believe we had practically finished the arguments on both sides, and I continued the case until today in order that there might be some expression from persons who might still want to be heard. Is there anybody else?

Mr. Bortin: I have not concluded my argument, but I think I had argued sufficiently at the time, but my brief covers all the other points I did not cover in my argument.

The Court: Is there any important part of your brief that you will like to argue orally? I am going to read your brief, but I assure you the Court does not like to hear any more argument.

Mr. Bortin: You will recall in the middle of the argument, during my argument I came to the point where my contention was that the banking department had no interest in these proceedings, and at that point you suggested that why did not other parties who felt they were interested come into this court and so on, and the argument ended abruptly, and it was put off until yesterday, and then today. [fol. 59] I don't know whether Your Honor wants to hear any further argument, but, of course, I could continue.

The Court: Well, now I have not read your brief yet, but I will not cross that bridge until I come to it, but if you

want to call our attention to the salient points in your brief orally, you may do so, otherwise we will consider the arguments closed. Mr. Willing, is there anything you would like to say?

Mr. Willing: I would only want about two minutes in reply to Mr. Bortin. At the close of Mr. Bortin's argument he stressed the fact that he was filing other bills in equity and that in due time the Secretary of Banking would be requested to file a petition for the appointment of a substituted trustee for the pools, and also, it was said that any participant in those mortgage pools had a right to file a petition for the appointment of a substituted trustee. That point I want to make clear to your Honor. We admit that. The difference between that point and the bills which are before your Honor is this: Laura Washington, Mary O'Brien and the third complainant in the third bill in equity are asking the Court, as I understand it, to take their participating certificates from the custody and control of the Secretary of Banking, and deliver those participating certificates to the Court's receiver. If that were their prayer, perhaps we would not be so interested in this case, and that is as far as they might go in the State Court, but the significance and importance of this case is that Laura Washington and Mary O'Brien are not only asking that the Court appoint a receiver for their particular pool, for their particular certificate, but a receiver for all of the participating certificates which aggregate, added at this time to Colonel Holden's representatives, approximately six million dollars, and as nearly as my recollection goes, there isn't fifty thousand dollars represented in all the bills in equity before your Honor.

[fol. 60] Now, these bills were filed on behalf—and this is not an argument, this is just directing the Court's attention to something—these bills were filed on behalf of the various complainants and such other persons who would desire to join, and up to the present time nobody has joined these complainants in their prayer for the appointment of receivers. Therefore, in considering all of the arguments which were advanced, I would like to have the Court to see that this is a bill in equity that requests the appointing of a substituted trustee not for the particular respects in which these complainants may have, and for the purpose of this argument have a legitimate interest, not for the

Court to appoint someone on behalf of their interests alone, but to appoint a receiver over two or three million dollars worth of other participating certificates in which these complainants in the present bills in equity can have no interest except one of association.

The Court: Mr. Willing, here is what I would — you to make plain to me. We have a bill in equity here asking for equitable relief on the part of persons who we all admit are interested, have a real live interest in the case. Now, as far as the Court can see, no one who has a correspondingly live, active interest has come forward in the case to object. It is true you represent the Banking Department, but as the statute discloses, and I believe we agree upon that, it would appear that the Banking Department has merely custody of the fund with the obligation imposed upon it to divest itself of that custody.

Now, is it your contention that the Banking Department has any other status than has been set forth, or do you allege that the Banking Department has a real, live, interest in this fund and its management? Now, that is what I want to get from you.

[fol. 61] Mr. Willing: If an ordinary receiver, whether appointed by this Court or the Court of Common Pleas has, and the interest can be distinguished on the one hand as a real, live interest and one as a mere custody or control, then if your Honor can see that distinction, I say that the Banking Department has a real, live interest, because it has this custody, but not to sit on those pools as a hen might sit on eggs and expecting something to hatch, that is not what they do, but it is active, more active than even in the handling of a closed bank, because when the bank is closed, the doors are locked and no activity goes on for awhile, but when a trust department of a bank is taken over, the law requires that that trust department can be active for the benefit of those persons who have an interest.

The Court: Yes.

Mr. Willing: Yes, sir.

The Court: Do you claim that the Banking Department has any other privilege in this case than the right, as you express it, to ask for a substituted trustee? Answer that question, please, if you will.

Mr. Willing: Between the time that it takes possession and the time it files the petition for the appointment of a

substituted trustee, it has every right in the matter that the defunct corporation had, the same as a trustee under a will. In other cases it would act in a different capacity, but whatever rights the defunct corporation has up until the time that they asked the Court to make the appointment of a substituted trustee, the Banking Department is the active custodian, receiver, or custodian, by whatever name you want to call it, until that Court wants to throw them out.

[fol. 62] The Court: You have had that control for about eight months?

Mr. Willing: From February until August.

The Court: Until September, now.

Mr. Willing: Well, September.

The Court: Very nearly seven months. During that time you have not exercised your privilege of asking for a substituted trustee. Now, isn't your thought that you can now deprive a person who has a live interest in it from coming to this court in the matter?

Mr. Willing: It is my thought——

The Court: You can answer that "yes" or "no."

Mr. Willing: It is my thought that I should say to your Honor that one of the men who was appointed receiver of one of these pools was actively in charge of these pools as the special deputy for a period of how many months I don't know, and he could probably tell your Honor what things were done which were under his jurisdiction that I know nothing about, because I have never had anything to do with this bank prior to this case.

Mr. Bortin: Your Honor, let me have a few words. Mr. Willing has suggested the idea that every participating certificate holder should come individually and ask for a substituted trustee or a fiduciary for his particular interest in that pool. That is a very impractical thing, because there may be five or six hundred of these participating certificate holders, and it would be impossible, no more than it would be possible for each creditor to come in and ask for the appointment of a receiver individually for his particular interest in the corporation's assets. The one request for the appointment of a substituted fiduciary represents the interests of a number of holders.

[fol. 63] Now, with respect to having a substituted fiduciary appointed, Mr. Willing was arguing that the Banking Department feels that no one has joined these people in

their request for the appointment. Now, I want to call your Honor's attention to the Act of 1933, which is the act that the Banking Department and the Attorney General are using in support of their argument. I have here an opinion by the Attorney General which reads:

"The owner of an undivided interest——" I am reading from page 81 "—in any mortgage or securities pool or in a special mortgage or securities pool probably has the right to ask for a substituted fiduciary at any time."

That is what it says.

The Court: That must be very recent.

Mr. Bortin: Certainly, it is very recent.

The Court: Who is that by?

Mr. Bortin: It must be by the Attorney General.

Mr. Willing: It is by the Attorney General.

Mr. Bortin: That certainly eliminates the argument about that, anyone has the right to file such a petition at any time either before or after the filing of the account by the secretary.

The Court: Is that in your brief?

Mr. Bortin: Yes.

The Court: I will take that under consideration.

Mr. Willing: I am going to file a motion to dismiss the bill of the third case that was filed.

The Court: Would you mind stating for the record just what you would want the Court to do? It is better if we get it down on the record so that we can know just what [fol. 64] we are deciding here, and also if an appeal should be taken from our decision.

I understand they would like to file an answer.

Mr. Willing: That is true.

The Court: You are staking your case upon the lack of jurisdiction of this Court.

Mr. Willing: There are four or five points. May I put it this way. We are stating of record there is pending before your Honor a motion to dismiss the bill in equity in the case of Laura A. Washington versus William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as Agent in Possession of Chester County Trust Company, which is under June Term, 1933, No. 7845.

There is also pending before your Honor a motion to dismiss the bill in equity of Mary A. O'Brien versus Wil-

liam D. Gordon, Secretary of Banking, and Robert F. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and that is endorsed as of June Term, 1933, No. 7849.

There is a third bill in equity of Emma R. Lindley versus William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and that is endorsed June Term, 1933, No. 7857.

To these three bills in equity, motions to vacate the appointment of the receivers, or, I should say, rather, to the two bills in the case of the O'Brien bill and the Laura Washington bill, motions were filed to vacate the appointment of receivers and to dismiss the bills in equity for reasons which are set out in the motions to vacate and in the motions to dismiss. It is on that motion to vacate and motion to dismiss that the argument was made before your Honor and continued until today, and that is the record.

[fol. 65] The Court: As to the third bill, do we agree that it is to be taken into consideration together with the first two bills and to be treated as if it were one case?

Mr. Willing: Yes.

The Court: So that whatever is done with reference to the first two bills in equity would apply to the third bill?

Mr. Willing: Yes.

Mr. Bortin: In other words, as I understand it, if the motions of Mr. Willing are dismissed, then your Honor is in a position to appoint a temporary receiver in the third bill?

The Court: Yes.

Mr. Bortin: And then the petition to dismiss and the petition to vacate will fall as a matter of Court.

The Court: And the rights of the defendant in the third bill will apply as in the first two.

Mr. Willing: That is right.

Mr. Bortin: That is right.

The Court: What we want to do is get this thing head on so that there will not be any frittering of time away on immaterial points.

Mr. Bortin: I call your Honor's attention to the fact that your Honor had changed the order.

The Court: The temporary order?

Mr. Bortin: The temporary order by making it temporary receiver. Of course, if receivers are appointed in the third case it will be the same.

[fol. 66] IN UNITED STATES DISTRICT COURT

OPINION—Filed October 4, 1933

WELSH, J.:

On the 25th day of August, 1933, Laura A. Washington, a citizen of the State of Connecticut, instituted proceedings in equity against William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as agent in possession of the Chester County Trust Company.

The Bill sets forth that the complainant is the holder of a participation certificate issued by the Chester County Trust Company of West Chester, Pennsylvania, in the sum of $40,000.00, of a trust fund mortgage pool; that this trust fund mortgage pool represents moneys received by the Chester County Trust Company, to be maintained as a trust fund, separate and apart from its assets, and invested in first mortgages secured on real estate in the State of Pennsylvania; that participation certificates in this pool have been issued by the Chester County Trust Company to various persons aggregating in amount, the sum of $2,901,236.07, and that the funds have been invested in mortgages set apart from the assets of the trust company, as the property of complainant and other certificate holders.

The Bill further avers that on February 14, 1933, the Chester County Trust Company was closed at the direction of William D. Gordon, Secretary of Banking of the State of Pennsylvania, by reason of its insolvent and unsafe condition, and the Secretary of Banking thereupon took possession of its assets, and is in the process of liquidating same; that at the time that the Secretary of Banking took possession of the assets of the trust company, he also took custody of the assets of the trust fund forming the mortgage pool.

[fol. 67] The Bill alleges that since the Secretary of Banking took into his custody the said mortgage pool, interest payments on many of the mortgages comprising part of its

assets and taxes due on many parcels of real estate encumbered by mortgages of the mortgage pool, have not been paid by the mortgagors or received by the Secretary of Banking or his Deputy, and that little effort is made to secure the collection of such charges; that there is danger of sales of the encumbered real estate by reason of the nonpayment of taxes and little effort is made by the Secretary of Banking to compel payment of these taxes; that no interest or income has been received by the complainant or other certificate holders since the closing of the Chester County Trust Company; nor, has the Secretary of Banking filed an account in relation to the said mortgage pool; that the management is, therefore, making little effort to protect the assets of the trust fund to the detriment and damage of complainant and like holders of trust certificates. Complainant prays for the appointment of a Receiver to conserve and administer the assets of the trust estate comprising the mortgage pool, for the benefit of its certificate holders exclusively.

On the same day the complainant filed her Bill, she also filed a Motion for the appointment of a Receiver pending hearing on the Bill and Answer. A hearing was fixed on said motion for August 30, 1933. Due service was made of said Bill, Motion and Notice of Hearing.

On August 30, 1933, a hearing was held, at which time counsel for complainant and defendants appeared. Defendants' counsel vigorously opposed the appointment of a Receiver. No Answer was filed at the time, nor has it since been filed. After argument, and upon consideration of the averments of complainant's Bill, the Court granted complainant's Motion for appointment of a Receiver, and en- [fol. 68] tered an order appointing Edward W. Wells, Richard F. Ennis, Louis Breitinger, and John Hemphill, Receivers, with directions to take possession of all mortgages, property and assets comprising the trust mortgage pool originally held by Chester County Trust Company in its fiduciary capacity, but now in the custody of the Secretary of Banking, in possession of the Chester County Trust Company. Although the order appointing the Receivers did not specifically so state, it was intended that this appointment should be temporary only until hearing on Bill and Answer. The court subsequently modified its original

order so that the appointment was temporary until hearing on the Bill and Answer.

This matter is now before the Court on two petitions filed by the Secretary of Banking for the State of Pennsylvania, one to vacate the order of Appointment of Receivers, and the other to dismiss the Bill. The Court fixed Friday, September 22, 1933, as a time for hearing on the said petitions. At this time counsel for both complainant and defendants again appeared and argued the questions involved at length. The Secretary of Banking resisted the appointment of Receivers for the mortgage pool, principally on the ground that the Federal Court was without jurisdiction because, first, the action involved a suit against the State of Pennsylvania, and second, because the Secretary of Banking, having filed a certificate of taking possession of the Chester County Trust Company's assets in the Judgment Index of Chester County, that the Chester County Court alone retained jurisdiction.

It is somewhat difficult to understand the position of the Banking Department of the State of Pennsylvania in this case. What interest and standing has that department? Their position is one of bare, temporary custody, with the [fol. 69] duty and responsibility thrown upon them to divest themselves of even that status at the earliest possible moment. Section 40 of the Act of 1923 (1923, June 15th, P. L. 809).

Sub-Section B provides as follows:

"Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the secretary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the secretary shall himself apply for such appointment of substituted fiduciaries."

In order that this might be made perfectly plain and be beyond all question of doubt the amending Act of July 3, 1933, Sec. 801, specifically provides as follows:

"References in this act to funds, property, or investments held in a fiduciary capacity by an institution of which the secretary has taken possession, shall apply only to funds, property, or investments held in such fiduciary capacity by the trust department of such institution and shall not apply to funds, property, or investments which were held by the commercial department of such institution."

This Court continued the hearing on this case on two separate occasions in order to permit holders of participating certificates to appear and be heard. The Court required all such persons who desired to intervene to do so and expressed a request for an expression of their views. No [fol. 70] such holders of participating certificates have taken advantage of this offer and no one of such class is in any way concerned so far as the record in the instant case appears. At the last hearing it was stated by a member of the Bar present in the court that one of his associate members of the Bar desired him to state orally to the Court that participating holders in a large amount would prefer that the matter be adjudicated in the local courts of Chester County, Pennsylvania.

It would appear, therefore, that from the record that the banking department of the State of Pennsylvania, with the record above referred to, had challenged fairly and squarely the jurisdiction of this Court on the ground that jurisdiction conferred by the Constitution of the United States on non-resident plaintiffs does not apply. This contention is based on the argument that a statute of Pennsylvania, above referred to (Act of 1933) can deny to such non-resident plaintiffs the right to the jurisdiction of this Court.

The law on this subject as viewed by this Court was fully expressed in a full and complete opinion recently in the case of Elson v. Mortgage Building and Loan Association. The authorities and principle of law involved are there reviewed and set forth at length. The Court deems it unnecessary at this time to again do this. It may help clarify the question if some reference is made to the alleged assumption of jurisdiction by the Court of Common Pleas of Chester County. Section 604 of the act provides:

"Certificates of Possession; Filing.—A. The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of

the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the [fol. 71] affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county of the Commonwealth, or with the proper official in any other state or county, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the institution or title to which is in its name. Such copy shall be recorded in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located."

It would seem from the provisions of the above act that the filing of a certificate which the defendants construe to be an assumption of court jurisdiction in Chester County [fol. 72] is really nothing of the kind. It merely amounts

to the making of a proclamation by which all persons are put upon notice of the new state of affairs existing with regard to the closed institution.

The comity which exists between jurisdictions, and which would give control to the tribunal first assuming it, must be an actual, real taking of the case in hand. It was admitted during the argument of the instant case that no judge of a Chester County Court had the power to refuse or reject anything done in this case by the Banking Department. This Court, therefore, holds that there has been no jurisdiction within the meaning of the term by the local court in question. This Court having affirmed the jurisdiction of the Federal Court in the instant case a word as to the motives which move it as a Chancellor to act would seem to be in order. It must be remembered that the Banking Department took charge of the defunct institution on February 14, 1933. Notwithstanding the fact that millions of dollars are concerned, and a large number of certificate holders are involved nothing has been done by the Banking Department to provide the means for an active, intelligent, responsible administration of its pools. Just why such a situation has continued to exist has not been explained. Non-resident petitioners in this case are dissatisfied with such inaction. In the exercise of their constitutional rights they have appealed to the equity side of this court for relief. They are alarmed over the safety of their holdings. No excuse, no explanation, and no promises of a future policy have been given. No interested group of fellow participants in the pool have entered an appearance or objected as a matter of record. This Court, therefore, feels that it not only has jurisdiction, but that in view of the status of the case its duty as a Chancellor is that that jurisdiction [fol. 73] be recognized and that the prayed for relief be granted.

The prayer of the petition to vacate the appointment of the Receiver is dismissed.

IN UNITED STATES DISTRICT COURT

DECREE—Filed October 26, 1933

And Now, to wit, October 26, 1933, it appearing that the Circuit Court of Appeals has allowed an appeal in this

case from the decree of October 4, 1933, overruling the motion to dismiss the bill and refusing the petition to vacate the decree appointing receivers; and it appearing that no formal decree was entered on October 4, 1933, to the above effect, although the opinion filed on that date concluded with the words: "The prayer of the petition to vacate the appointment of the receivers is dismissed and the motion to dismiss the bill is overruled";

It is Ordered and decreed that the following order be entered as of October 4, 1933:

The prayer of the petition to vacate the appointment of the receiver is dismissed and the motion to dismiss the bill is overruled.

Welsh, J.

Approved:

D. Bortin, Attorney for Plaintiff.

October 24, 1933.

[fol. 74] In United States District Court

Petition for Appeal—Filed October 16, 1933

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of Chester County Trust Company, and of Robert G. Funkhouser, deputy receiver of Chester County Trust Company, respectfully represents:

The petitioners, who are the defendants above named, feeling aggrieved by the decree entered in the above-entitled cause on August 30, 1933, appointing receivers, and by the decree entered on September 22, 1933, amending the said decree of August 30, 1933, and by the decree entered on October 4, 1933, overruling and denying the defendants' motion to dismiss the bill of complaint, and dismissing the defendants' petition for an order to vacate the said decree appointing receivers, do hereby appeal from the said decrees to the Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith; and pray that this appeal be allowed and that a

citation be allowed as provided by law and that a transcript of the record, proceedings and documents upon which the said decrees were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of the said Court in such cases made and provided.

And your petitioners further pray that the proper order be made in regard to security to be required of them, so that this appeal may act as a supersedeas.

[fol. 75] And your petitioners aver that your petitioner William D. Gordon has given bond, as required by law, conditioned for the faithful performance of his duties as Secretary of Banking of the Commonwealth of Pennsylvania, which bond is in the sum of $50,000, is executed by American Surety Company as surety, and expires on March 23, 1934; and that your petitioner Robert G. Funkhouser has given bond, as required by law, conditioned for the faithful performance of his duties as deputy receiver of Chester County Trust Company, which bond is in the sum of $200,000, is executed by the United States Fidelity & Guaranty Company as surety, and expires on May 8, 1934.

Wherefore, your petitioners further pray that they may give their own bond, without surety, as the security to be required of them so that this appeal may act as a supersedeas.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania; Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania; by Shippen Lewis, Special Deputy Attorney General, Attorneys for the Petitioners.

[fol. 76] *Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ORDER DENYING APPEAL—Filed October 16, 1933

Order refused and petition for appeal dismissed.

(Sgd.) Welsh, J.

[fol. 77] IN UNITED STATES DISTRICT COURT

STIPULATION RE NOTES OF TESTIMONY—Filed November 27 1933.

It is hereby stipulated by and between Shippen Lewis, Esq., Joseph K. Willing, Esq., William S. Schnader, Esq., attorneys for the defendants herein, and Hirschwald, Goff & Rubin, Esqs., and David Bortin, Esq., attorneys for the plaintiffs herein, that all of the testimony taken in the above-captioned cases be printed as part of the record in the Circuit Court of Appeals.

(Sgd.) William S. Schnader, Shippen Lewis, Joseph K. Willing, Attorneys for the Defendants; Hirschwald, Goff & Rubin, David Bortin, Attorneys for the Plaintiffs.

[fol. 78] IN UNITED STATES DISTRICT COURT

AMENDED PRÆCIPE SUR TRANSCRIPT OF RECORD—Filed November 2, 1933.

To the Clerk of the United States District Court:

In making up the record sur appeal in the above case you will include the following papers:

Docket entries.

Bill of complaint.

Motion for appointment of receivers.

Decree of August 30, 1933 (write "temporary" in handwriting over carets wherever it so appears in the original).

Petition and order for citation in contempt.

Answer to contempt proceedings.

Summary of testimony as filed herewith on hearing held September 5, 1933.

Motion to dismiss bill.

Petition to vacate order.

Supplement to said petition.

Decree of September 22, 1933, amending decree of August 30, 1933.

Opinion of court dated October 4, 1933.

Decree of October [illegible], 1933, entering a decree as of October 4, 1933, denying prayer to vacate and refusing motion to dismiss bill.

Petition for appeal and supersedeas.

[fol. 79] Order denying prayer for appeal and refusing supersedeas.

Summary of testimony as filed herewith on hearing held September 26, 1933.

Amended præcipe sur transcript of record.

Acceptance of service of amended præcipe and of notice of lodgment of summary of testimony.

Clerk's certificate.

(Sgd.) Shippen Lewis, Special Deputy Attorney General.

November —, 1933.

Acceptance of Service

I accept service of a copy of the amended præcipe sur transcript of record and of notice of lodgment of the summary of testimony and that the said summary of testimony will be presented to the Court for approval on November 13, 1933, without agreeing that said record of testimony is correct.

(Sgd.) David Bortin, Attorney for Appellee.

November 1, 1933.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

Term, 1933

No. 5280

[Title omitted]

PETITION FOR SUPERSEDEAS

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Chester County Trust Company, and Robert G. Funkhouser, Deputy

Receiver of Chester County Trust Company, respectfully represents:

1. Your petitioner, William D. Gordon, is, and has been since before February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania, and by virtue of the powers and duties conferred upon him by the laws of Pennsylvania, took possession on February 14, 1933, of the business and property of Chester County Trust Company, a corporation having its place of business in the Borough of West Chester, in Chester County, Pennsylvania.

[fol. 82] 2. Immediately upon taking possession as above stated, William D. Gordon filed a certified copy of his certificate of possession with the prothonotary of the Court of Common Pleas of Chester County, who docketed and indexed it as required by the laws of Pennsylvania.

3. Your petitioner, Robert G. Funkhouser, is the Deputy Receiver of Chester County Trust Company, duly appointed by the Secretary of Banking in accordance with the laws of Pennsylvania.

4. Chester County Trust Company operated a mortgage trust fund, or mortgage pool, which is the subject of controversy in this cause, against which pool there had been issued to various participants certificates of interest aggregating far in excess of one million dollars.

5. Under the laws of Pennsylvania the Secretary of Banking has all the powers of a general receiver appointed by a court of equity with respect to the business and property of the Chester County Trust Company, and he is especially charged by statute with certain duties with respect to the said mortgage pool. Under the laws of the United States and of the Commonwealth of Pennsylvania the Court of Common Pleas of Chester County has sole jurisdiction of the Secretary of Banking as receiver of Chester County Trust Company, of his management of the said mortgage pool, and of the actions of your petitioners with respect to the said pool.

6. Complainant in this cause has filed a bill in equity in the United States District Court for the Eastern District of Pennsylvania, praying for the appointment of receivers of the said mortgage pool. Before the time for filing an an-

[fol. 83] swer to this bill had expired and before any answer had been filed, without taking any testimony in support of the bill, and upon less than one hour's notice of hearing to counsel for your petitioners, his Honor, Judge Welsh, entered a decree on August 30, 1933, appointing receivers of the said mortgage pool. A copy of this decree is hereto annexed, marked Exhibit A.

7. On September 4, 1933, the Court of Common Pleas of Chester County ordered an injunction to issue restraining your petitioners or any of their agents from delivering any asset or record of the said mortgage pool to any receiver appointed by the United States District Court. A copy of this injunction, which was duly issued and served, is hereto annexed, marked Exhibit B.

8. On September 5, 1933, your petitioner, Robert G. Funkhouser, with his two assistants, Albert N. Pusey and C. Archer Darlington, appeared before his Honor, Judge Welsh, in pursuance of a rule to show cause why they should not be adjudged in contempt for failing to turn over the assets and records of the said mortgage pool. At this hearing a motion to dismiss the bill of complaint and a petition to vacate the appointment of the receivers were filed by the Attorney General on behalf of your petitioner. It was then stated by his Honor, Judge Welsh, and agreed to by counsel for both parties that the receivers should act no further in the premises unless and until his Honor, Judge Welsh, should overrule the said motion and dismiss the said petition after argument thereon. September 22, 1933, was fixed for the said argument. Thereafter, on September 15, 1933, Shippen Lewis, Esq., Special Deputy Attorney General and an attorney of record for your petitioner, confirmed the said understanding by a letter to his Honor [fol. 84] Judge Welsh and by sending a copy to counsel of record for the complainant. A copy of the said letter is hereto attached marked Exhibit C.

At the said hearing on September 5, 1933, and repeatedly thereafter, it was stated by his Honor Judge Welsh that he wished to make such an order as would squarely raise the question of jurisdiction for decision by the Circuit Court of Appeals, to which your petitioner was prepared to appeal on September 5, 1933, prior to the aforesaid understanding.

9. On September 22, 1933, his Honor Judge Welsh, of his own motion, entered a decree amending his decree appointing receivers by the insertion of the word "temporary" before the word "receivers." A copy of this decree of September 22 is hereto annexed marked Exhibit D.

10. At the said argument on September 22, 1933, his Honor Judge Welsh continued the matter until September 25, 1933, so as to give holders of participation certificates in the said pool an opportunity to be heard, stating, however, that he would hear no one who did not submit to the jurisdiction of his court. On September 26, 1933, A. M. Holding, Esq., and Ernest Harvey, Esq., of the Chester County Bar, were present to inform the Court that they and their associates represented holders of certificates with a large aggregate value and that their clients objected to the proposed receivership and wished the pool managed or liquidated by a substituted fiduciary ap-ointed by the Court of Common Pleas of Chester County. However, his Honor Judge Welsh was unable to hear argument on September 25th and continued the case until September 26th, when Messrs. Holding and Harvey were unable to attend. After the argument on September 26th, his Honor Judge Welsh took the case under consideration and thereafter filed an opinion and an order on October 4, 1933.

[fol. 85] 11. On October 4, 1933, his Honor Judge Welsh entered a decree overruling the said motion and refusing the said petition. A copy of this decree and of the opinion on which it is based are attached hereto marked Exhibit E.

12. On October 9, 1933, your petitioners presented to his Honor Judge Welsh a petition to allow an appeal from the said decree of August 30, 1933, appointing receivers, from the said decree of September 22, 1933, amending the decree appointing receivers and from the said decree of October 4, 1933, overruling the motion to dismiss the bill, and refusing the said petition to vacate. His Honor Judge Welsh refused to allow this appeal or to grant a supersedeas.

13. Your petitioner William D. Gordon has given bond, as required by law, conditioned for the faithful performance of his duties as Secretary of Banking, which bond is in the sum of $50,000, is executed by American Surety Company as surety, and expires on March 23, 1934; and your

petitioner Robert G. Funkhouser has given bond, as required by law, conditioned for the faithful performance of his duties as deputy receiver of Chester County Trust Company, which bond is in the sum of $200,000, is executed by the United States Fidelity & Guaranty Company as surety, and expires on May 8, 1934.

Wherefore your petitioners pray your Honorable Court to allow an appeal from the said decrees for the reasons set forth in the assignments of error filed herewith; and your petitioners further pray that a citation be allowed as provided by law and that a transcript of the record, proceedings and documents upon which the said decrees were passed, duly authenticated, be directed to be sent to your [fol. 86] Honorable Court; and your petitioners further pray that an order be made in regard to the security to be required so that the said appeal shall act as a supersedeas; and your petitioners further pray that the said security shall consist of your petitioners' own bond without surety.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania; Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania; by Shippen Lewis, Special Deputy Attorney General.

Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPEAL

And now, to wit, October 9, 1933, on consideration of the foregoing petition and on motion of Joseph K. Willing, Esq., Shippen Lewis, Esq., and William A. Schnader, Esq., attorneys for the petitioners, it is hereby ordered that an appeal is allowed to the United States Circuit Court of Appeals for the Third Circuit from the decree of the United States District Court for the Eastern District of Pennsylvania, in the above cause, dated August 30, 1933, appointing receivers, and from the decree of the said court

dated September 22, 1933, amending the said decree appointing receivers and from the decree of October 4, 1933, overruling the motion to dismiss the bill and refusing the petition to vacate the said decree appointing receivers.

It is further ordered that the bond on appeal be fixed at the sum of $250, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

And it is further ordered that the said bond shall be the bond of the appellants without surety.

By the Court:

Victor B. Woolley, C. J.

[fols. 88-90] EXHIBIT A TO PETITION FOR APPEAL

[Omitted. Printed side page, 25 ante.]

[fol. 91] EXHIBIT B TO PETITION FOR APPEAL

Injunction

CHESTER COUNTY, ss:

The Commonwealth of Pennsylvania to Robert G. Funkhouser, Deputy Receiver of Chester County Trust Company, your agents, workmen, laborers, and servants, Greeting:

Whereas, it hath been represented to us in our Court of Common Pleas, sitting in Equity, for the County of Chester aforesaid, in a certain cause there depending, wherein Harvey Fitzsimmons is complainant, and you and William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Chester County Trust Company, are defendant, on the part of the complainant, that he has lately exhibited his bill of complaint in our said Court of Common Pleas, sitting in Equity, against you, the said Defendant, praying to be relieved touching the matter [fol. 92] herein contained, and that thereupon, upon motion for Injunction and hearing thereof, and upon the said complainant filing a bond in the penal sum of One thousand dollars ($1000.00) Dollars, with surety approved by the Court as required by the Acts of Assembly in such case made and provided, it was ordered that a preliminary injunction issue pursuant to the prayer of the said bill to restrain you, the said defendant, until further order, from

delivering to any or all persons appointed Receivers by the United States District Court for the Eastern District of Pennsylvania, all mortgages, securities, books, papers, records, and all other matters appertaining to the mortgage participation pool until hearing shall be had on this Bill, which is hereby set for September 8th, 1933, at 9 A. M., and thereafter to abide further order.

We therefore, in consideration of the premises aforesaid, do strictly command and enjoin you, the said Robert G. Funkhouser, Deputy Receiver as aforesaid, Your agents, workmen, laborers, and servants, and all and every one of you, that you do from henceforth, altogether absolutely desist from delivering to any or all persons appointed Receivers by the United States District Court for the Eastern District of Pa., all mortgages, securities, books, papers, records and all other matters appertaining to the mortgage participation pool until hearing shall be had on this Bill, which is hereby set for September 8th, 1933, at and thereafter to abide further order. Until our said Court shall make other order to the contrary.

Witness the Hon. J. Frank E. Hause, President Judge of our said Court at West Chester, Pa., this 4th day of September, A. D., 19–

Certified from the Record:

Lewis R. Downing, Prothonotary, by —— ——, Dep. Prot.

[fol. 93] EXHIBIT C TO PETITION FOR APPEAL

September 15, 1933.

Laura A. Washington v. William D. Gordon, Secretary of Banking

U. S. District Court, E. D. of Pa., No. 7845, June Term, 1933

Mary A. O'Brien v. William D. Gordon, Secretary of Banking

U. S. District Court, E. D. of Pa., No. 7849, June Term, 1933

Hon. George A. Welsh. Post Office Building, Philadelphia, Pa.

DEAR JUDGE WELSH: In the above cases, we are ready at any time to carry out the agreement made with you by the

Attorney General at side bar on September 5th. It was then agreed that you would make orders overruling our motions to dismiss any denying our petitions to vacate; that we would then give possession of the assets and records of the mortgage pools to the persons named as receivers, the assets and records remaining undisturbed in the bank; that we would then promptly appeal to the Circuit Court and you would allow a supersedeas in each case; and that possession of the assets and records would then be immediately returned to us.

However, I understand that the present agreement with you is that our motions and petitions shall be argued on September 22nd. I hope that you will find it possible to have all three judges sit at that time, as we consider this a very important matter.

Yours very truly,

Shippen Lewis, Special Deputy Attorney General.

SL:D

[fol. 94] Exhibit D to Petition for Appeal.

[Omitted. Printed side page, 55 ante.]

Recital as to Exhibit E to Petition for Appeal.

Opinion

See opinion of Judge Welsh, printed at pages 66 to 73 of this Record.

[fol. 95] In United States District Court, Eastern District of Pennsylvania, June Term, 1933

No. 7849

In Equity

[Title omitted]

Assignments of Error—Filed October 9, 1933

And now, to wit, this ninth day of October, 1933, come the defendants in the above-entitled cause and file the following assignments of error:

1. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree of August 30, 1933, appointing receivers:

[fol. 96] In the District Court of the United States for the Eastern District of Pennsylvania, June Term, 1933

In Equity

No. 7849

Mary A O'Barr, Complainant,

vs.

William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Defendants.

Order

And now, to wit, this 30th day of August, A. D. 1933, upon consideration of the within Bill and after hearing thereon, and upon motion of David Bortin, Esquire, Attorney for the Complainant, it is hereby

Ordered that John Hemphill and J. Louis Breitinger, be appointed Receivers of trust fund mortgages aggregating $1,742,404.91 against which Certificates were issued by the Chester County Trust Company, located at West Chester, Pennsylvania, and now in possession of William D. Gordon, Secretary of Banking, of the State of Pennsylvania, by Robert G. Funkhouser, his Special Deputy as Agent in Possession of Chester County Trust Company, to hold and preserve all the mortgages, property and assets, real, personal and mixed, of whatsoever kind and description including any cash on hand and belonging to and being a part of the said trust fund, and it is further

[fol. 97] Ordered that the said Receivers be and — authorized wherever necessary to demand, sue for, collect or institute and prosecute any actions or suits in law or equity for the recovery of any interest or principal of mortgages, or both, and, wherever necessary, to institute foreclosure proceedings upon default of any of the terms or provisions of said mortgages, when, in the judgment or discretion of the said Receivers, such action is desirable and necessary, and

to defend, compromise, adjust, intervene or become a party to any suits or actions in law or equity, as may be necessary in the judgment of the Receivers for the proper protection and maintenance of the assets of the said mortgaged trust fund and the carrying out of the terms of this decree, and likewise to defend, compromise, adjust or otherwise dispose of any and all suits, actions and proceedings that may now be pending and embracing any of the assets of the said trust fund mortgages and to take any other action or proceedings which in the judgment of the said Receivers may be advisable or proper for the protection of the assets of said trust fund mortgages, and the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and the Chester County Trust Company and any of their agents, deputies or officers are forthwith bound, upon demand of the Receivers to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers representing property under their control and belonging to the said mortgaged trust fund, and it is further

Ordered and decreed that the defendants, their servants, agents and employees are hereby enjoined from taking any action which might be hostile to or interfere with the conduct or management of the said mortgaged trust fund by the Receivers with leave, however, to any party in interest [fol. 98] to have the order herein modified, all moneys received by the said Receivers to be deposited in a designated depository, and that they advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein, and it is further

Ordered that the said Receivers be, and are hereby authorized in their discretion to employ such servants, attorneys, and counsel as may be in their judgment advisable or necessary in the management, conduct, control or custody of the said mortgaged trust fund, and the said Receivers be and are hereby authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets of said mortgaged trust fund, and it is further

Ordered and decreed that the Receivers may enter into such agreements, employ such agents in connection with

the management, care and preservation of the said mortgaged trust fund as they may deem advisable, subject to the approval of the Court in advance, and they are authorized to incur such expenses and make such disbursements as may, in their judgment, be advisable or necessary in connection with the care, preservation and maintenance of the said mortgaged trust fund, and it is further

Ordered that the Receivers within 30 days of their appointment, file with the Court a preliminary report and inventory of the assets and condition of the said mortgaged trust fund coming into their possession as Receivers, and it is further

Ordered that the said Receivers make quarterly reports to this Court as to the condition of said mortgaged trust fund and that security *to* be entered by the said Receivers in the sum of $150,000.00.

It is further ordered that when the amount coming into the hands of the said Receivers shall exceed the sum of [fol. 99] $150,000.00 that the said Receivers shall file additional security.

By the Court:

(Sgd.) Welsh, J.

2. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree on September 22, 1933:

"And now, to wit, this 22nd day of September A. D. 1933, it appearing to the court that its order entered on the 30th day of August A. D. 1933 in the above matter wherein John Hemphill and J. Louis Breitinger were appointed receivers, failed to set forth that the appointment of such receivers was Temporary until hearing on Bill and Answer, although such temporary appointment was intended, it is

Ordered and decreed that the said order be and it is hereby amended so that John Hemphill and J. Louis Breitinger shall only have the rights, duties and privileges of Temporary Receivers in the above matter until hearing on Bill and Answer or other disposition of the cause, and that Wherever the word Receiver or Receivers appears that the word 'Temporary' shall precede it."

3. The United States District Court for the Eastern District of Pennsylvania erred in refusing to grant the defend-

ants' petition to vacate and set aside the said decree of August 30, 1933, appointing receivers.

4. The United States District Court for the Eastern District of Pennsylvania erred in overruling the defendants' motion to dismiss the bill of complaint, which motion was as follows:

"And Now, September 5, 1933, come the defendants, by their solicitors, Joseph K. Willing and Shippen Lewis, and [fol. 100] move the Court to vacate and set aside the order entered on August 30, 1933, appointing receivers, and to dismiss the Bill of Complaint for want of equity, for the following reasons:

1. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, is in possession of the business and property of the Chester County Trust Company by virtue of the laws of Pennsylvania and that he has, with respect to those assets, all the powers and duties of a general receiver appointed by any Court of Equity in Pennsylvania, except as such rights, powers and duties are increased or limited by the provisions of the Department of Banking Code which became effective on July 3, 1933.

2. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, as Secretary of Banking, in possession of the Chester County Trust Company is 'responsible to the Court in which the Certificate of Possession is filed and not to any other court'.

3. From the face of the bill and from the laws of Pennsylvania it appears that the Court of Common Pleas of Chester County have already assumed jurisdiction of the defendants, William D. Gordon and Robert G. Funkhouser, in their respective capacities of Receiver and Deputy Receiver of Chester County Trust Company.

4. From the face of the bill and from the laws of Pennsylvania it appears that the defendants are bound to file an account as to the said mortgage pool with the Court of Common Pleas of Chester County, and to deliver the assets of the pool only to a substituted fiduciary appointed by that Court, unless all the owners of undivided interests in

the said pool agree upon the delivery of those assets to a person designated by them.

5. It does not appear in the bill that the Court of Common Pleas in Chester County or the owners of all undivided [fol. 101] interests in the pool have authorized the defendants to deliver any assets or records of the said mortgage pool to anyone.

6. From the face of the bill it does not appear that the complainant has made any effort to procure the appointment by the Court of Common Pleas of Chester County, of a substituted fiduciary of the said mortgage pool, as provided by the laws of Pennsylvania.

7. The bill does not state any facts to show that any damage has been done or will be done to any party in interest if receivers are not appointed.

8. The complainant has an adequate remedy by application to the Court of Common Pleas of Chester County for the appointment of a substituted fiduciary of the said mortgage pool.

9. The District Court of the United States has no authority to appoint, under the title of receivers, persons who are in fact intended to act as substituted fiduciaries of the said mortgage pool.

10. The United States District Court has no authority to interfere with the Commonwealth of Pennsylvania in the exercise of the Commonwealth's powers.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Solicitors for Defendants."

5. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree on October 4, 1933:

[fol. 102] "The prayer of the petition to vacate the appointment of the receiver is dismissed and the motion to dismiss the bill is overruled."

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania;

Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania; Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by Shippen Lewis, Special Deputy Attorney General, Attorneys for the Defendants.

[fol. 103] IN UNITED STATES CIRCUIT COURT OF APPEALS, OCTOBER TERM, 1933

No. 5279

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed January 4, 1934

To the Honorable, the Judges of the Circuit Court of Appeals of the United States of America, Second Circuit:

The petition of the undersigned respectfully represents:

1. That the Chester County Trust Company was chartered under the laws of Pennsylvania, on October 13, 1900.

2. That, thereafter and continuously until taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, as hereinafter stated, it was engaged, at West Chester, Chester County, Pennsylvania, in the business of [fol. 104] banking, the investment of moneys, the administration of trusts as fiduciary, and other like business as authorized under the laws of Pennsylvania.

3. In the administration of certain of the trusts in which the said Trust Company was trustee or fiduciary, it established and maintained a pool of first mortgages, secured upon real estate situated largely in Chester County aforesaid, and, to a lesser extent, in Delaware and Montgomery Counties, in the State of Pennsylvania; into which pool it invested certain of the funds of trust estates in which it was the fiduciary.

4. At the period at which the business and property of the said Trust Company were taken over by the said Secretary of Banking of the Commonwealth of Pennsylvania, the face value of mortgages in said pool amounted to the

sum of $2,901,236.07, of which sum $2,880,635.39 of the funds of said trusts were invested in said pool.

Of this sum of $2,880,635.39, your petitioners, as succeeding trustees, or as beneficiaries, are entitled to, or interested in the aggregate sum of $1,716,684.70; and your petitioners are, therefore, vitally interested in the expert and expeditious administration thereof.

5. On February 14, 1933, the Secretary of Banking of Pennsylvania took "possession of the business and property" of the said Chester County Trust Company, inclusive of the said pool of mortgages, in accordance with the mandates of the laws of Pennsylvania; and filed a certificate of said possession in his office at Harrisburg, Pennsylvania; and, thereafter, on February 15, 1933, filed a certified copy of said certificate in the office of the Prothonotary of Chester County, Pennsylvania; all in accordance with the requirements of The Banking Act of 1923.

[fol. 105] 6. That, thereafter, the said Secretary of Banking, as required by said law, entered on his duties as a receiver of the business and property of the said Trust Company, under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, as provided by law; and among the "business and property" of the said Trust Company, the said Secretary of Banking took possession of the mortgage pool hereinabove referred to.

7. Under the law of Pennsylvania pertaining thereto, the said Secretary of Banking of Pennsylvania, upon taking possession of the business and property of the said Trust Company, became expressly responsible to the Court of Common Pleas of Chester County aforesaid, in which its certificate of possession was filed.

That, thereafter, the said Secretary of Banking, as required by the law of Pennsylvania, maintained possession of all of the mortgages in the above-recited pool, and conducted the business of said pools from February 14, 1933, until the order or decree of the United States District Court for the Eastern District of Pennsylvania, herein referred to.

8. On August 25, 1933, a Bill in Equity (No. 7845, June Term, 1933), was filed in the said United States District Court by Laura A. Washington, a citizen of Connecticut,

against the said Secretary of Banking of the Commonwealth of Pennsylvania and his Special Deputy; in which she averred, inter alia, that little effort had been made by the said Secretary of Banking, or his Deputy, to secure the collection of interest upon the mortgages in said pool, or to compel the payment of taxes assessed against the mortgaged premises; and that there was danger of the sales of real estate or properties upon which the mortgages in said [fol. 106] pool were secured, for non-payment of taxes, which averments are denied by your petitioners.

Said plaintiff, in her said Bill therefore prayed the appointment, by the United States District Court aforesaid, of a receiver or receivers to take possession and charge of the said mortgage pool, and to administer the same.

9. That, under and by virtue of the petition of the said Laura A. Washington, the said United States District Court for the Eastern District of Pennsylvania, without any notice to your petitioners, and, as they are advised, believe, and, therefore, aver, without any notice whatever of said petition to any of the parties interested in the trusts, the funds of which were invested in said pool, or in the mortgages therein, appointed two receivers to take possession and control of said pool and to administer the same.

10. That the first and only notice that any of your petitioners had of the filing of the said petition, or of the said action thereon, was a report thereof in the public newspapers.

11. That your petitioners are earnestly opposed to the appointment of the Receivers as aforesaid to administer the said pool, for the following reasons,—

(1) The greater number of the mortgages in the aforesaid pool are secured upon real estate in Chester County, Pennsylvania. The remainder of the mortgages are secured upon real estate in Delaware and Montgomery Counties, Pennsylvania, counties of the same general character as the County of Chester; and, as we are advised, none of the said mortgages is invested upon property in the City of Philadelphia; that, by reason thereof, an experienced and otherwise duly qualified receiver or receivers resident in Chester County and familiar with the real estate

[fol. 107] values in Chester County and like counties, and, in very many instances, acquainted with the mortgagors and the character and record thereof, will be much better qualified to administer this trust, and will administer the same much more to the satisfaction of your petitioners and all others who are the real owners of the funds invested in this estate.

(2) Furthermore, your petitioners believe and, therefore, aver, that the administration of the said pool and the mortgages therein under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, will be greatly to the advantage of your petitioners and the other owners of the funds invested in said pool.

Your petitioners, therefore, believing that it will be greatly to their advantage to have this pool administered under the jurisdiction of the Court of Common Pleas of Chester County, and by a receiver or receivers appointed by said Court, respectfully pray your Honorable Court to permit them to intervene as parties appellant in the above-recited bill now pending in the Court.

And they will, etc.

	Amt. of interest in pool
	$91,000.00

John B. McCrery, by J. L. McCrery, His Father and Next Best Friend.

	Amt. of interest in pool
The Penna. Co. for Ins. on Lives and Granting Annuities, Substitute Trustee under the Will of James J. Williamson, decd.	$41,000.00
By Joseph Neff Ewing, Attorney.	
[fol. 108] Girard Trust Co., Substituted Trustee under the Will of John S. Worth, decd.	100,000.00
By Joseph Neff Ewing, Attorney.	
The First National Bank of West Chester, Substituted Fiduciary for the following Trusts:	
By W. Perry Tyson, Trust Officer.	
Frances M. Bonnell, Trust	10,000.00
Emma S. Darlington, Trust	7,917.35
Barbara Edge, Guardianship	8,200.00
Dorothy Edge, Guardianship	8,200.00
Judge Joseph Hemphill, Estate	23,882.41
Ann Hemphill D'Hendicourt, Trust	8,555.00

	Amt. of interest in pool
Mary B. Smith, Trust	6,868.96
Ethel Buckwalter Webb, Trust	9,500.00
Jennie Boone Willetts et al.	7,678.04
Ado Latch, Estate	4,071.00
Greenberger, Minors, Guardian	5,818.00
Hannah P. Downing, Trust	17,407.00
The Wentworth Association—	
U/w John Huey	10,000.00
U/w Rachel Townsend	3,372.00
By Isabel Darlington, Attorney.	
Ida J. Sharpless	10,439.77
By Isabel Darlington, Attorney.	
Est. Jesse J. Ferrell—	
Mary A. Meredith	2,000.00
James L. Ferrell	1,850.00
By Isabel Darlington, Attorney.	
[fol. 109] Est. Stephen L. Moore—	
Isabella M. March	3,420.68
By Isabel Darlington, Attorney.	
Est. of John R. Lilley, decd.—	
Lydia M. Skelton, Lilley S. Shank	16,141.65
By Isabel Darlington, Attorney.	
Est. Hannah Buffington, decd.	1,620.92
By Isabel Darlington, Attorney.	
Est. S. Winfield Todd, decd.	1,177.41
By Isabel Darlington, Attorney for Ethel N. Nagle.	
Est. Andrew Vincent Harold, Jr., a Minor	300.00
By Isabel Darlington, Attorney.	
Est. John Wm. Cogan, a weak-minded	7,300.00
By Isabel Darlington, Attorney.	
Est. Robert Eason	109.55
Est. Wm. Eason	87.61
By Isabel Darlington, Attorney.	
Thomas W. Baldwin, Trustee u/w of Jos H. Baugh, Deceased	12,380.48
Thomas W. Baldwin, attorney for Est. S. Ida Baugh, person of weak mind	19,700.00
Anna M. Sheller	312.25
Per Thomas W. Baldwin, Attorney.	
Estate of William A. Webb	4,500.00
Per Thomas W. Baldwin, Attorney.	

	Amt. of Interest in pool
[fol. 110] Estate of John G. Moses, The First National Bank of West Chester, Sub. Guardian By Thomas W. Baldwin, Attorney.	18,400.00
Estate of Carlos Bingham Cochran, The First National Bank of West Chester, Sub. Trustee By Thomas W. Baldwin, Attorney.	7,019.36
Estate of Caleb J. Hoopes, The First National Bank of West Chester, Sub. Guardian By Thomas W. Baldwin, Attorney.	3,400.00
Estate of Elwood Morgan, National Bank of Chester County and Trust Company, West Chester, Substituted Trustee By Thomas W. Baldwin, Attorney.	15,676.19
Maggie M. Vance's Estate, National Bank of Chester Valley, Sub. Trustee By Thomas W. Baldwin, Attorney.	1,184.92
Estate of Rachel S. Martin, National Bank of Chester County and Trust Company, West Chester, Substituted Trustee By Thomas W. Baldwin, Attorney.	500.00
Estate of Elwood Patrick, National Bank of Chester County and Trust Company, West Chester, Sub. Trustee By Thomas W. Baldwin, Attorney.	5,200.00
[fol. 111] J. Hampton Guthrie's Est By Thomas W. Baldwin, Attorney.	413.11
Estate of Frank U. Davis, The First National Bank of West Chester, Sub. Trustee By Thomas W. Baldwin, Attorney.	564.46
Estate of Linda A. Painter, decd. By J. Carroll Hayes, Attorney.	38,000.00
Farmers & Mechanics Natl. Bank, Phoenixville, Pa., Substituted Trustee u/w of Hamilton H. Gilkyson, Sr., decd. By A. M. Holding, Attorney.	37,937.50
New London Presbyterian Church	211.75
Katharine G. Humes Est. By A. M. Holding, Attorney.	150.00
New London Presbyterian Church, James W. McFadden Est. By A. M. Holding, Attorney.	199.75
C. M. Pennock (McClure Est.) By A. M. Holding, Attorney.	15,763.19

	Amt. of Interest in pool
William Grant By A. M. Holding, Attorney.	10,000.00
Helen Lewis By A. M. Holding, Attorney.	8,855.00
[fol. 112] Trustees for St. Peter's Church in the Great Valley By A. M. Holding, Attorney.	21,444.60
Mary Travilla Whiting By A. M. Holding, Attorney.	44,185.98
Norman W. Davis By A. M. Holding, Attorney.	383.06
Wilson W. Leamey By A. M. Holding, Attorney.	1,000.00
G. M. Huey By A. M. Holding, Attorney.	61,997.30
A. D. Huey By A. M. Holding, Attorney.	90,194.21
Alfred B. Jacob By A. M. Holding, Attorney.	400.00
Thomas S. Meller By A. M. Holding, Attorney.	7,624.98
Mary Hall Smedley By A. M. Holding, Attorney.	25,000.00
Emlen C. Fawcett By Holding & Harvey, Attorneys.	8,108.42
Mary Speakman Ruggles By A. M. Holding, Attorney.	1,057.35
[fol. 113] Chester S. Speakman By A. M. Holding, Attorney.	1,142.60
R. F. Ellis McClellan By A. M. Holding, Attorney.	2,850.00
William W. Good, Esther R. Good, Francis Good and Spencer T. Good By A. M. Holding, Attorney.	9,149.88
National Bank of Chester Valley, Trustee for Anna Reed Storey, Hunt B. Storey and Nancy Miles Storey By A. M. Holding, Attorney.	1,209.32
Annie Phillips Estate By A. M. Holding, Attorney.	4,750.00
Frank B. Buchanan Estate By A. M. Holding, Attorney.	16,072.51

	Amt. of Interest in pool
Emma R. Lindley By A. M. Holding, Attorney.	20,000.00
Estate of E. P. Timmons By A. M. Holding, Attorney.	110,461.26
E. J. Acker, Treasurer, Vincent Baptist Church, and Henry C. Dewees et al., Trustees By A. M. Holding, Attorney.	3,000.00
Wm. Gheen West Estate By H. R. McGowan, Attorney.	78,191.44
[fol. 114] Goshen Preparative Meeting of Friends By E. William Byle, Attorney.	1,100.00
Willistown Preparative Meeting of Friends By E. William Byle, Attorney.	6,000.00
J. Sharpless Serrill, Life Tenant u/w S. Emlen Sharpless, decd. By E. William Byle, Attorney.	3,657.35
Lillian A. Alexander By Arthur T. Parke, Attorney.	134.34
Andrew Bullock, Jr. By Arthur T. Parke, Attorney.	2,400.00
Annie M. Crossan By Arthur T. Parke, Attorney.	6,198.25
Clarissa M. C. Haines By Arthur T. Parke, Attorney.	1,065.90
Ellen Hickman By Arthur T. Parke, Attorney.	15,000.00
Leurana Moore By Arthur T. Parke, Attorney.	1,433.72
Mary McCamant Estate By Arthur T. Parke, Attorney.	26,637.66
Anna Belle Ronk By Arthur T. Parke, Attorney.	24.00
[fol. 115] Mary Elizabeth Ronk By Arthur T. Parke, Attorney.	23.98
Paul Elmer Ronk By Arthur T. Parke, Attorney.	24.00
Mary Louise Twaddell By Arthur T. Parke, Attorney.	629.68
Annie B. Weaver By Arthur T. Parke, Attorney.	7,516.84

	Amt. of interest in pool
Lida Williams Weaver	1,750.00
By Arthur T. Parke, Attorney.	
Faggs Manor Presbyterian Church (James Ramsey Trust)	500.00
By Arthur T. Parke, Attorney.	
Margaret Ramsey Est. Session Faggs Manor Pres.	1,000.00
By Arthur T. Parke, Attorney.	
William G. Roberts	30,000.00
By Arthur T. Parke, Attorney.	
Eva J. Reese Est. (for Faggs Manor Church, 1st National Bank of West Chester, Sub. Trustee)	2,449.04
By Arthur T. Parke, Attorney.	
Jane Ann Kerr Est.	1,398.74
By Walter S. Talbot, Attorney.	
[fol. 116] Amy Lee Kerr Est.	1,398.74
By Walter S. Talbot, Attorney.	
Georgianna Jack Clark Est.	1,128.18
By Walter S. Talbot, Attorney.	
Kathryn M. Clark Est.	1,138.67
By Walter S. Talbot, Attorney.	
Ravanna B. Graff Est.	12,700.00
By Walter S. Talbot, Attorney.	
Ashton B. Talbot Est.	5,400.00
By Walter S. Talbot, Attorney.	
John K. Bair Est.	39,999.45
By Walter S. Talbot, Attorney.	
Emma A. Baldwin (Caleb S. Baldwin) Est.	1,000.00
By Walter S. Talbot, Attorney.	
John Wesley Ranck Est.	675.00
By Walter S. Talbot, Attorney.	
Gertrude P. M. Arters Est.	5,651.80
By Walter S. Talbot, Attorney.	
Laura A. Lilley Est.	2,254.25
By Walter S. Talbot, Attorney.	
Garfield Milhaus Est.	1,646.00
By Walter S. Talbot, Attorney.	
[fol. 117] Francis A. Morrison Est.	2,920.00
By Walter S. Talbot, Attorney.	
Rebecca Townsend Est	260.00
By Walter S. Talbot, Attorney.	

	Amt. of interest in pool
Lewis W. Hickman Est.	1,100.00
By Walter S. Talbot, Attorney.	
Esther A. Hickman Est.	983.00
By Walter S. Talbot, Attorney.	
Harry Kelley Est.	125.00
By Walter S. Talbot, Attorney.	
Adelaide Budd Est.	2,675.00
By Walter S. Talbot, Attorney.	
Fairview Presbyterian Church and Cemetery	3,200.00
By Walter S. Talbot, Attorney.	
T. Elwood Lewis Est.	1,250.00
By Walter S. Talbot, Attorney.	
Mary J. Speakman Est.	500.00
By Walter S. Talbot, Attorney.	
Hadfield	135.00
By Walter S. Talbot, Attorney.	
Leona E. Winchester.	600.00
By J. Paul MacElree, Attorney.	
[fol. 118] James W. Ross	3,000.00
By J. Paul MacElree, Attorney.	
D. Frederick Hannum	1,000.00
By J. Paul MacElree, Attorney.	
Mary W. H. Anderson	6,000.00
By J. Paul MacElree, Attorney.	
James T. Branson Est.	2,875.23
By A. M. Holding, Attorney.	
Emmerene R. Moore Est.	38,257.57
By A. M. Holding, Attorney.	
Mary E. Branson Est.	4,514.72
By A. M. Holding, Attorney.	
Edith W. Hall Est.	10,050.00
By A. M. Holding, Attorney.	
Anna G. Brown, beneficiary u/w of Annie M. Sensenig, decd.	20,375.19
By A. M. Holding, Attorney.	
Annie G. Clayton	6,762.90
By A. M. Holding, Attorney.	
Dora W. Cope, u/w of Fred Cope	11,310.45
By A. M. Holding, Attorney.	
Lewis P. Good's Est.	9,149.88
By A. M. Holding, Attorney.	

	Amt. of interest in pool
[fol. 119] Maggie J. Haynes, beneficiary u/w of Abner Pyle, decd.	28,360.54
By A. M. Holding, Attorney.	
Ellen D. Longacre, u/w of Ellen R. Rutter, decd.	7,110.20
By A. M. Holding, Attorney.	
Charles Cresson Roberts et al., u/w of Mercy Anna Roberts	26,462.63
By A. M. Holding, Attorney.	
Mary E. Watson and Effie Watson, u/w of Annie M. Sensenig	6,000.00
By A. M. Holding, Attorney.	
Estate of Wilmer Thomson	7,622.13
By A. M. Holding, Attorney.	
Faggs Manor Presbyterian Congregation Church Cemetery, F. S. Brown, Treasurer	12,157.19
By A. M. Holding, His Attorney.	
Mary P. H. Furman	10,095.25
By I. N. Earl Wynn, Attorney.	
Catharine Black Wyers	2,273.82
By I. N. Earl Wynn, Attorney.	
C. Aurelia Hunt, et al.	942.04
By I. N. Earl Wynn, Attorney.	
[fol. 120] Casper P. Worthington	1,816.72
By I. N. Earl Wynn, Attorney.	
W. W. Hoopes, Trustee	27,860.80
By I. N. Earl Wynn, Attorney.	
Benjamin R. Walker	7,840.70
By I. N. Earl Wynn, Attorney.	
Mary E. Carver	23,126.50
By I. N. Earl Wynn, Attorney.	
Edna Lehman, weakminded	8,150.00
By I. N. Earl Wynn, Attorney.	
Emma I. Maxton,	2,577.68
By I. N. Earl Wynn, Attorney.	
Margaret A. King	5,905.26
By I. N. Earl Wynn, Attorney.	
George L. McSurdy, D/T	5,000.00
By I. N. Earl Wynn, Attorney.	
Sophia P. Wentworth	23,697.81
By I. N. Earl Wynn, Attorney.	
Clara Marshall	8,269.72
By I. N. Earl Wynn, Attorney.	

	Amt. of interest in pool
Lidie M. Cummings	2,375.79
By I. N. Earl Wynn, Attorney.	
William J. McKeowan	22,000.00
By I. N. Earl Wynn, Attorney.	
[fol. 121] Clara E. Jensen	8,000.00
By I. N. Earl Wynn, Attorney.	
Sarah J. Pennock McCreary	3,724.41
By I. N. Earl Wynn, Attorney.	
Lillian P. Thayssen	3,813.57
By I. N. Earl Wynn, Attorney.	
Dr. Thomas Parke	25,081.68
By I. N. Earl Wynn, Attorney.	
Eugene H. Walter	10,352.51
By I. N. Earl Wynn, Attorney.	

Duly sworn to by A. M. Holding. Jurat omitted in printing.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS, OCTOBER TERM, 1933

No. 5280

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed January 4, 1934

To the Honorable, the Judges of the Circuit Court of Appeals of the United States of America, Second Circuit:

The petition of the undersigned respectfully represents:

1. That the Chester County Trust Company was chartered under the laws of Pennsylvania, on October 13, 1900.

2. That, thereafter and continuously until taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, as hereinafter stated, it was engaged, at West Chester, Chester County, Pennsylvania, in the business of banking, the investment of moneys, the administration of [fol. 123] trusts as fiduciary, and other like business as authorized under the laws of Pennsylvania.

3. That, in the investment of moneys for its patrons, it established and maintained a pool of first mortgages, se-

cured upon real estate situated largely in Chester County aforesaid, and, to a lesser extent, in Delaware and Montgomery Counties, in the State of Pennsylvania; into which pool it invested large sums of money furnished by its patrons for investment.

4. That, at the period at which the business and property of the said Trust Company were taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, the face value of mortgages in said pool amounted to the sum of $1,743,570; against which it issued to patrons first mortgage certificates to the aggregate sum of $1,735,615.17; and funds belonging to its banking department to the amount of $8954.83.

Of these first mortgage certificates, certificates to the amount of $326,250.00, were issued to your petitioners; and they are, therefore, vitally interested in the expert and expeditious administration thereof.

5. On February 14, 1933, the Secretary of Banking of Pennsylvania took "possession of the business and property" of the said Chester County Trust Company, inclusive of the said pool of mortgages, in accordance with the mandates of the laws of Pennsylvania; and filed a certificate of said possession in his office at Harrisburg, Pennsylvania; and, thereafter, on February 15, 1933, filed a certified copy of said certificate in the office of the Prothonotary of Chester County, Pennsylvania; all in accordance with the requirements of the Banking Act of 1923.

6. That, thereafter, the said Secretary of Banking, as required by said law, entered on his duties as a receiver of [fol. 124] the business and property of the said Trust Company, under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, as provided by law; and among the "business and property" of the said Trust Company, the said Secretary of Banking took possession of the mortgage pool hereinabove referred to.

7. Under the law of Pennsylvania pertaining thereto, the said Secretary of Banking of Pennsylvania, upon taking possession of the business and property of the said Trust Company, became expressly responsible to the Court of Common Pleas of Chester County aforesaid, in which its certificate of possession was filed.

That, thereafter, the said Secretary of Banking, as required by the law of Pennsylvania, maintained possession of all of the mortgages in the above-recited pool, and conducted the business of said pools from February 14, 1933, until the order or decree of the United States District Court for the Eastern District of Pennsylvania, herein referred to.

8. On August 25, 1933, a Bill in Equity (No. 7849, June term, 1933), was filed in the United States District Court for the Eastern District of Pennsylvania, by Mary A. O'Brien, a citizen of the State of New Jersey, against the said Secretary of Banking of the Commonwealth of Pennsylvania and his special deputy; in which was averred, inter alia, that little effort was being made to secure the collection of the interest upon the mortgages in said pool; that little effort was being made to compel the payment of taxes upon the mortgaged property; that there was danger of sales by reason of the nonpayment of such taxes; and that, unless a receiver was appointed by said Court, to take possession of the said mortgages, assets, books and records forming said mortgage pool, that the interest on said mort-
[fol. 125] gages would continue in default; all of which averments are denied by your petitioners.

Said plaintiff, in her said bill, therefore, prayed the appointment, by the United States Court aforesaid, of a receiver or receivers to take possession and charge of the said mortgage pool and to administer the same.

9. That, under and by virtue of the petition of the said Mary A. O'Brien, the said United States District Court for the Eastern District of Pennsylvania, without any notice to your petitioners, and, as they are advised, believe, and, therefore, aver, without any notice whatever of said petition to any of the parties interested in the first mortgage certificates, the funds of which were invested in said pool, or in the mortgages therein, appointed two receivers to take possession and control of said pool and to administer the same.

10. That the first and only notice that any of your petitioners had of the filing of the said petition, or of the said action thereon, was a report thereof in the public newspapers.

11. That your petitioners are earnestly opposed to the appointment of the receivers as aforesaid to administer the said pool, for the following reasons—

(1) The greater number of the mortgages in the aforesaid pool are secured upon real estate in Chester County, Pennsylvania. The remainder of the mortgages are secured upon real estate in Delaware and Montgomery Counties, Pennsylvania, counties of the same general character as the County of Chester; and, as we are advised, none of the said mortgages is invested upon property in the City of Philadelphia; that, by reason thereof, an experienced [fol. 126] and otherwise duly qualified receiver or receivers resident in Chester County and familiar with the real estate values in Chester County and like counties, and, in very many instances, acquainted with the mortgagors and the character and record thereof, will be much better qualified to administer this pool, and will administer the same much more to the satisfaction of your petitioners and all others who are the real owners of the funds invested in this estate,

(2) Furthermore, your petitioners believe and, therefore, aver, that the administration of the said pool and the mortgages therein under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, will be greatly to the advantage of your petitioners and the other owners of the funds invested in said pool.

Your petitioners, therefore, believing that it will be greatly to their advantage to have this pool administered under the jurisdiction of the Court of Common Pleas of Chester County, and by a receiver or receivers appointed by said Court, respectfully pray your Honorable Court to permit them to intervene as parties appellant in the above-recited bill now pending in the Court.

And they will, etc.

	Amt. of interest in pool
Denney Tag Co	$25,000.00
Per Holding & Harvey, Its Attorneys.	
Cloyd R. Baldwin	12,000.00
Per Holding & Harvey, Its Attorneys.	
[fol. 127] Thos. J. Cassidy	4,000.00
Per Holding & Harvey, His Attorneys.	
James J. Anderson	4,300.00
Per Holding & Harvey, His Attorneys.	

	Amt. of interest in pool
Mary A. Anderson	4,300.00
Per Holding & Harvey, Her Attorneys.	
John Downing	1,000.00
Per Holding & Harvey, His Attorneys.	
Irving F. Walton	500.00
Per Holding & Harvey, His Attorneys.	
Irving F. Walton and Alma J. Walton	500.00
Per Holding & Harvey, Their Attorneys.	
Joseph Scattergood	2,000.00
Per Holding & Harvey, His Attorneys.	
Henry C. Dewees, Treasurer Vincent Baptist Cemetery Fund	2,000.00
Per Holding & Harvey, His Attorneys.	
Robert E. Stewart and Margaret Stewart	2,000.00
Per Holding & Harvey, Their Attorneys.	
Lucy I. Smedley	1,000.00
Per Holding & Harvey, Her Attorneys.	
A. W. Mackey	7,000.00
Per Holding & Harvey, His Attorneys.	
[fol. 128] Verna C. Cloud	1,000.00
Per Holding & Harvey, Her Attorneys.	
John B. Tanguy	2,000.00
Per Holding & Harvey, His Attorneys.	
Caroline P. Tanguy	1,000.00
Per Holding & Harvey, Her Attorneys.	
Albert J. Wilson	4,000.00
Per Holding & Harvey, His Attorneys.	
Samuel E. Worth	1,500.00
Per Holding & Harvey, His Attorneys.	
W. J. Dixon	2,500.00
Per Holding & Harvey, His Attorneys.	
Maurice R. Baker and June L. Baker	1,200.00
Per Holding & Harvey, Their Attorneys.	
Lawrence W. Moore	600.00
Per Holding & Harvey, His Attorneys.	
Anna Worth Russell	1,000.00
Per Holding & Harvey, Her Attorneys.	
Eliz. T. O'Brien	3,000.00
Per Holding & Harvey, Her Attorneys.	
Eugene C. Shener	500.00
Per Holding & Harvey, His Attorneys.	

	Amt. of interest in pool
[fol. 129] Katherine G. Kelly	2,000.00
Per Holding & Harvey, Her Attorneys.	
Helen Moore Heald	600.00
Per Holding & Harvey, Her Attorneys,	
Mary A. Moynihan	3,000.00
Per Holding & Harvey, Her Attorneys.	
Helen Moroney Carroll	1,000.00
Per Holding & Harvey, Her Attorneys.	
James L. Moroney	2,000.00
Per Holding & Harvey, His Attorneys.	
Mary I. Moroney	750.00
Per Holding & Harvey, Her Attorneys.	
Mary R. West	6,450.00
Per Holding & Harvey, Her Attorneys.	
Walter D. Nesbit	4,000.00
Per Holding & Harvey, His Attorneys.	
Pusey L. Moore	1,000.00
Per Holding & Harvey, His Attorneys.	
Elsie P. Casselberry	1,000.00
Per Holding & Harvey, Her Attorneys.	
J. Allen Way	2,200.00
Per Holding & Harvey, His Attorneys.	
[fol. 130] Rachie S. Way	3,400.00
Per Holding & Harvey, Her Attorneys.	
E. E. La Due	3,000.00
Per Holding & Harvey, Her Attorneys.	
Hanna E. Ewing	1,000.00
Per Holding & Harvey, Her Attorneys.	
Charles Baker	5,000.00
Per Holding & Harvey, His Attorneys.	
C. Harry Spencer	2,150.00
Per Holding & Harvey, His Attorneys.	
William J. Cornell	10,000.00
Per Holding & Harvey, His Attorneys.	
Etta M. Cornell	5,000.00
Per Holding & Harvey, Her Attorneys.	
Mary B. Slack	4,000.00
Per Holding & Harvey, Her Attorneys.	
Ada P. Walter	2,200.00
Per Holding & Harvey, Her Attorneys.	
Elmer E. Stiteler	2,500.00
Per Holding & Harvey, His Attorneys.	

	Amt. of Interest in pool
Wm. B. Harvey	4,500.00
Per Holding & Harvey, His Attorneys.	
[fol. 131] Lelah M. King	1,500.00
Per Holding & Harvey, Her Attorneys.	
Mary E. Stanley	1,700.00
Per Holding & Harvey, Her Attorneys.	
Irma Fertig, Violet V. Fertig, Admrs. of Elmer P. Fertig, dec'd	4,000.00
Per Holdign & Harvey, Their Attorneys.	
Martha J. Lukens	6,600.00
Per Holding & Harvey, Her Attorneys.	
Charles E. Ortlip and Saml. S. Ortlip	1,000.00
Per Holding & Harvey, Their Attorneys.	
Sarah E. F. Dale	500.00
Per Holding & Harvey, Her Attorneys.	
Nellie Reese Donache	2,000.00
Per Holding & Harvey, Her Attorneys.	
Mary B. Senior	800.00
Per Holding & Harvey, Her Attorneys.	
Isaac G. Roberts	2,800.00
Per Holding & Harvey, His Attorneys.	
Ella Swayne Roberts	500.00
Per Holding & Harvey, Her Attorneys.	
Margaret T. Buckwalter	3,000.00
Per Holding & Harvey, Her Attorneys.	
[fol. 132] Anna M. Baldwin Est	4,100.00
By Thomas W. Baldwin, Executor.	
Jacob M. Swayne	12,000.00
By Thomas W. Baldwin, His Attorney.	
Jacob M. Swayne (for Elizabeth N. Swayne)	4,500.00
By Thomas W. Baldwin, Her Attorney.	
Esther E. Baldwin	2,300.00
By Thomas W. Baldwin, Her Attorney.	
Clifton J. Marshall	5,000.00
By Thomas W. Baldwin, His Attorney.	
Clifton J. Marshall, Jr	1,000.00
By Thomas W. Baldwin, His Attorney.	
Clifton J. Marshall, Jr., and Arthur Marshall	1,000.00
By Thomas W. Baldwin, Their Attorney.	
Sarah B. Cochran	3,500.00
By Thomas W. Baldwin, Her Attorney.	

	Amt. of interest in pool
George W. Pierce	2,000.00
By Thomas W. Baldwin, His Attorney.	
Linnie M. Pratt	47,000.00
By Isabel Darlington, Her Attorney.	
Mary E. Speakman	5,500.00
By Isabel Darlington, Her Attorney.	
[fol. 133] Ida M. Ingram, E. Nora Lemmon	7,000.00
By Isabel Darlington, Their Attorney.	
C. Alfred Paxson, Exr., Ed. S. Paxson, dec'd	5,000.00
By Isabel Darlington, His Attorney.	
Ida J. Sharpless	3,000.00
By Isabel Darlington, Her Attorney.	
Thos. F. Furry, Exr	2,500.00
By Isabel Darlington, His Attorney.	
Elmer E. Stitler	2,500.00
By Isabel Darlington, His Attorney.	
West Chester Lodge, 908, Loyal Order of Moose	5,000.00
By H. R. McCowan, Attorney.	
Sarah E. Ross	14,000.00
By H. R. McCowan, Attorney.	
Samuel J. Richey	3,000.00
Per ——— ———, Attorney.	
James W. Ross	5,000.00
By J. Paul MacElree, Attorney.	
Elsie V. Boyd	450.00
By J. Paul MacElree, Attorney.	
Charles D. Boyd	450.00
By J. Paul MacElree, Attorney.	
[fol. 134] Jos. F. Parker Estate	1,000.00
I. N. Earl Wynn, Attorney.	
T. Ellsworth Moore Estate	2,400.00
I. N. Earl Wynn, Attorney.	
H. D. Ingram Estate	500.00
I. N. Earl Wynn, Attorney.	
Caroline Hannum Brown	3,500.00
By Arthur T. Parke, Attorney.	
F. S. Brown	2,000.00
By A. M. Holding, His Attorney.	
J. Clyde Brown	6,000.00
By A. M. Holding, His Attorney.	

Duly sworn to by A. M. Holding. Jurat omitted in printing.

[fol. 135] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

October Term, 1933

No. 5279

[Title omitted]

October Term, 1933

No. 5280

[Title omitted]

REFERENCE TO ARGUMENT

And afterwards, to wit, the fourth day of January, 1934, come the parties aforesaid by their counsel aforesaid, and these cases being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-eighth day of September, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fuly advised in the premises, renders the following decision:

[fol. 136] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT

October Term, 1933

No. 5279

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy, as Agent in Possession of Chester County Trust Company, Defendants-Appellants,

v.

LAURA A. WASHINGTON, Complainant, and EDWARD W. WELLS and RICHARD F. EWING, Receivers of Trust Fund Mortgages Aggregating $2,901,236.01, Against Which Certificates Were Issued by Chester County Trust Company, Appellees

October Term, 1933

No. 5280

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy, as Agent in Possession of Chester County Trust Company, Defendants-Appellants,

v.

MARY A. O'BRIEN, Complainant, and JOHN HEMPHILL and J. LOUIS BREITINGER, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91, Against Which Certificates Were Issued by Chester County Trust Company, Appellees

Appeals from the District Court of the United States for the Eastern District of Pennsylvania

[fol. 137] OPINION—Filed September 28, 1934

Before Buffington, Davis and Thompson, Circuit Judges

DAVIS, Circuit Judge:

This is an appeal from a decree appointing receivers for two mortgage pools of the Chester County Trust Company located at West Chester, Pennsylvania. There are two cases here involving identically the same questions of law and practically the same facts. They will, therefore, be disposed of in a single opinion.

On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, hereinafter called the Trust Company, in accordance with the provisions of the Act of Pennsylvania of June 15, 1923, P. L. 809, known as the Banking Act of 1923 and the Act of May 15, 1933, P. L. 565, known as the Department of Banking Code. On that day he filed a certificate of possession in his office at Harrisburg and on the following day he filed a certified copy of the certificate in the office of the prothonotary of Chester County in accordance with the requirement of the Act of June 15, 1923, which provides in section 22 that:

"When the secretary shall have duly taken possession of the business and property of a corporation or person as

provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name [fol. 138] of the secretary as plaintiff."

Among the assets of the Trust Company there were two mortgage pools, consisting of groups of mortgages held by the Trust Company as trustee, against which it had issued participation certificates.

The Secretary held possession of these mortgage pools from February 14 to August 25, 1933, when Laura A. Washington, a citizen of the State of Connecticut, and holder of mortgage certificates, filed a bill in equity in one mortgage pool against the Secretary and his deputy as agent in possession of the Trust Company, wherein she alleged that because of the little effort made by the Secretary or his deputy to collect interest and to pay bonds and taxes, irreparable damage to her and other holders of certificates would result unless receivers were appointed, and prayed for the appointment of receivers. A similar bill was filed by Mary A. O'Brien, a citizen of New Jersey, in the other mortgage pool.

On October 29, 1933, two receivers were appointed for each mortgage pool. They were authorized to hold and preserve all the assets, to collect the principal and interest and to make quarterly reports to the court.

The receivers on September 1, 1933, demanded possession from the deputy secretary of banking but this was refused and on the following day on petition the court issued a rule to show cause why the deputy receiver and his two subordinates in charge should not be adjudged in contempt for such refusal. These three persons in each pool appeared before the District Court, filed an answer in the contempt proceedings and moved the court to dismiss the bill and vacate the appointment of receivers. The [fol. 139] court refused the motions, but entered orders amending his decrees, and made the receivers "temporary" rather than permanent. Appeals were taken from the decrees appointing receivers, making them temporary and refusing the motions to dismiss and vacate.

The real question upon which the determination of this case depends is whether or not the filing of the certified copy of the certificate of possession in the prothonotary's office of Chester County conferred jurisdiction on the state court. If it did, this case was erroneously decided, for of two courts, state and federal, having concurrent and coordinate jurisdiction of the subject of an action, that court which first obtains jurisdiction has the right to proceed to its final determination without interference from the other. O'Neil v. Welch, 245 Fed. 261; Harkin et al. v. Brundage, 276 U. S. 36. This principle of law applies not only to actions involving corporations generally, but to those involving quasi public corporations. This we held in the case of Commonwealth of Pennsylvania v. John G. Williams, et al. — Fed. (2d) — (decided July 23, 1934), and it is unnecessary to repeat here what we said there.

The appellants say that "not only has the state officer (Secretary of Banking) long ago taken possession of the assets of the trust company, but the state law has put him in possession as 'receiver' and has subjected him to the jurisdiction of a particular state court," and therefore the United States court could not appoint receivers of the fund already in his possession. They base this contention on Section 701 of the Act of July 3, 1933, which provides that:

"Status of Secretary as Receiver.—Except as otherwise provided in this act, the Secretary when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of pos- [fol. 140] session is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court in equity in this Commonwealth, except as such rights, powers, and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any

power granted to or any duty imposed upon him as receiver of such institution.

The Secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another."

This section defines the status of the Secretary as the statutory receiver of the institution and defines his rights, powers and duties. It "subjects" him to the jurisdiction of a particular court, only in the sense that it points out the State court which shall have jurisdiction over him when it is invoked.

Judge Kirkpatrick in commenting on this section of the statute in the case of General Banking Company v. William G. Gordon and John J. Sullivan (decided October 11, 1932) said:

"As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking [fol. 141] is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority."

Upon taking possession of the business and property of the corporation, the Secretary shall forthwith make and file in his office at Harrisburg a certificate that he has taken possession and file a "certified copy thereof" in the office of the prothonotary. Counsel says that "constructive notice to the public is given, not by filing the duplicate certificate with the prothonotary, but by filing the original certificate in the Secretary's Office at Harrisburg. • • •

The duplicate certificate of possession is required to be filed with the prothonotary so that there will be a definite act marking the inception of the court's jurisdiction. It is analogous to the filing of a bill for the appointment of a receiver; though the judges know nothing of the matter, the court has jurisdiction from the moment such a bill is filed". But the statute does not so state.

The indexing of a certified copy of the certificate of possession, when filed in the office of the prothonotary by the Secretary, as plaintiff, in the "judgment index" does not confer upon the court jurisdiction which has not been invoked. The mere filing of a paper which in fact is nothing more than a notice that possession of the property of the corporation has been taken, cannot confer jurisdiction upon the court in the absence of any law to the effect that such [fol. 142] an act constitutes the beginning of legal action rather than the notice of a mere act of a state officer in the performance of his administrative duties. The Secretary, just as any other citizen, may invoke the jurisdiction of the court, but the simple filing of a mere notice of an administrative act does not do so and this seems evident from the terms of the Act. This paper is more particularly a notice to the county in which the corporation is located as distinguished from a notice to the Commonwealth generally when filed in Harrisburg. As Judge Kirkpatrick observed with regard to an "equity receiver" the fact that he is called "plaintiff" in this simple notice does not make him one in a legal action which the paper itself does not in terms, nor by necessary or reasonable implication, purport to institute. It is not analogous to the filing of a bill for a receiver, as stated by counsel, which contains definite allegations invoking the court's jurisdiction and praying for certain definite action of the court. The certificate does nothing of this kind. It is only a notice setting forth that the Secretary has taken possession of the business and property of the corporation, does not invoke the jurisdiction of the court and asks nothing whatever of it. It is rather analogous to the recording of a deed, mortgage or notice of lien.

In addition to filing a certificate of possession in his office in Harrisburg and a certified copy thereof in the office of the prothonotary in the county where the corporation is situated, the Secretary is required to file a certified

copy of the certificate in the office of the recorder of deeds in every county in the Commonwealth where real estate belonging to the corporation is located. The evident purpose of this requirement was to give special notice in these [fol. 143] counties as well as in the county in which the corporation is situated. The filing of certificates in these counties does not give the courts therein jurisdiction though the Secretary may at the proper time invoke their jurisdiction just as he may invoke the jurisdiction of the court in the county where the institution is located, for section 802 B of the Act of 1933 provides that:

"The Secretary may institute any action at law or in equity, or execute and sign any written instruments, which the institution itself could have instituted, executed or signed."

Mortgage pools in an insolvent corporation stand in a different relation to the Secretary from that of the general assets. The pools are trust funds which the corporation controls as a fiduciary. The act does not contemplate that they shall be liquidated with the other assets. Upon determining to liquidate the affairs of the corporation, the Secretary shall forthwith give written notice to all parties interested in any of the funds constituting the mortgage pool, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the Secretary shall himself apply for such appointment of substituted fiduciaries.

This provision shows beyond question that it was not the intention that the Secretary should liquidate these trust funds. They were to be turned over to the substituted fiduciary appointed by the "proper court or official" who would administer them, while the other assets of the institution are being liquidated by the Secretary. The Act contemplated that the Secretary would not only not liquidate [fol. 144] these funds but that he would not have custody of them except during the short period between the time he took possession and determined to liquidate the institution and could have a substituted fiduciary appointed. It is ap-

parent, from the provisions of the Act that it was never intended that the "court" should have custody of these mortgage pool funds unless its jurisdiction should be invoked, for section 40 (c) provides that when there is no dispute as to the amount or identity of the funds and all parties in interest are sui juris, the Secretary may deliver them directly to the substituted fiduciary. That is, the delivery of the funds by the Secretary may be made without the consent or knowledge of the court. It is evident that these funds were never in the custody of the court and form no part of those assets which are to be liquidated by the Secretary. When he takes possession of the assets of the institution, he thereafter makes an inventory and appraisement of them and the entire liquidation is under the jurisdiction of the court, but the mortgage pools are excluded from this liquidation. These funds are kept separate and apart from the other assets. They do not belong to the depositors, stockholders or creditors, and for this reason the Secretary is required to divest himself of them as soon as he decides to liquidate, and to deliver them to the substituted fiduciary.

The Secretary had no right to the custody of these funds when the bill in this case was filed. He determined to liquidate the assets of the Trust Company on April 3, 1933. It was his duty forthwith to give written notice to all parties interested in these funds requiring them within thirty days to apply to the proper court or official for the appointment of a substituted fiduciary to take the place of the Trust Company and if they failed or neglected to make the ap- [fol. 145] plication within that time, it was his duty to do so. He neither notified the parties in interest nor made the application himself, but did nothing and continued to hold the funds in violation of the statute. If he had performed his duties, as directed by the statute, he would have divested himself of these funds long before the bill was filed. The complainants are not attempting to take the assets of the Trust Company out of his custody or to interfere with the performance of his statutory duty in liquidating them. Consequently the decision in the case of Bank of Bay Biscayne v. Hankins, 42 Fed. (2d) 209 (C. C. A. 5) has no application to the facts in this case. In that case the State Comptroller had taken over the bank and was liquidating the bank and administering its assets as the statu-

tory officer entrusted with these assets for liquidation. The court said: "Whenever the laws of a state provide for supervision and control of the affairs of a bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere, and that should be done only in a perfectly clear case." Even there it is recognized that in a proper case the court had power to appoint receivers to liquidate the institution. But here the Secretary may continue to administer the assets of the Trust Company such as were involved there without interference by the receivers appointed in this case.

These mortgage pool funds not being in the possession, actual or constructive, of the court when the bill in this case was filed, the federal court had power to appoint receivers to administer them. They should have been out of the possession of the Secretary before the bill was filed, and whether or not they were thereafter taken out of his possession by the delivery of them to a substituted fiduciary [fol. 146] as the statute provided, or by the appointment of federal receivers, does not affect the performance of his duty in liquidating the Trust Company. The question here is really one of the exercise of discretion.

Appellants allege that this is a suit against the Commonwealth of Pennsylvania and is prohibited by the Eleventh Amendment to the Constitution of the United States.

Under the facts in this case this contention is unsound.

The question remains as to whether or not the learned District Judge, having power to appoint receivers, abused his discretion in doing so.

In his opinion to vacate the appointment of receivers, he said:

"It must be remembered that the Banking Department took charge of the defunct institution on February 14, 1933. Notwithstanding the fact that millions of dollars are concerned, and a large number of certificate holders are involved nothing has been done by the Banking Department to provide the means for an active, intelligent, responsible administration of its pools. Just why such a situation has continued to exist has not been explained. Non-resident

petition-s in this case are dissatisfied with such inaction. In the exercise of their constitutional rights they have appealed to the equity side of this court for relief. They are alarmed over the safety of their holdings. No excuse, no explanation, and no promises of a future policy have been given. No interested group of fellow participants in the pool have entered an appearance or objected as a matter of record. This Court, therefore, feels that it not only has jurisdiction, but that in view of the status of the case its duty as a Chancellor is that that jurisdiction be recognized and that the prayed for relief be granted."

[fol. 147] We cannot say that under all the facts of this case, the District Judge abused his discretion in appointing the receivers and the decrees are affirmed.

A true copy. Teste:
—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 148] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5279

William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as Agent in Possession of Chester County Trust Co., Appellants,

v.

Laura A. Washington, Complainant, and Edward W. Wells and Richard F. Ennis, Receivers of Trust Fund Mortgages Aggregating $2,901,236.09, Against Which Certain Certificates Were Issued by Chester County Trust Company, Appellees

Order Affirming Decrees—Filed September 28, 1934

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the

Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decrees of the said District Court in this cause be, and the same are hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 149] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5280

William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as Agent in Possession of Chester County Trust Co., Appellants,

v.

Mary A. O'Brien, Complainant, and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages Aggregating $1,752,404.91, Against Which Certificates Were Issued by Chester County Trust Company, Appellees

Order Affirming Decrees—Filed September 28, 1934

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decrees of the said District Court in this cause be, and the same are hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 150] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 151] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 549

ORDER ALLOWING CERTIORARI—Filed January 7, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 152] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 550

ORDER ALLOWING CERTIORARI—Filed January 7, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed of cover: File Nos. 39,177, 39,178. U. S. Circuit Court of Appeals, Third Circuit. Term No. 549. William D. Gordon, Secretary of Banking, et al., etc., Petitioners, vs. Laura A. Washington et al., etc. Term No. 550. William D. Gordon, Secretary of Banking, et al., etc., Petitioners, vs. Mary A. O'Brien et al., etc. Petitions for writs of certiorari and exhibit thereto. Filed November 28, 1934. File Nos. 549, O. T., 1934; 550, O. T., 1934.